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IN THE

Supreme Court of the United States

COLEGIO DE ABOGADOS DE PUERTO RICO,

Petitioner,

v.

HERBERT W. BROWN, JOSÉ L. UBARRI and DAVID W. ROMÁN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Circuit's decision to uphold a permanent injunction is in conflict with this Court's precedent and departs from the accepted and usual course of judicial proceedings, where the injunction was entered without establishing irreparable harm or absence of an adequate legal remedy and without considering the impact of intervening changes in state law.

II. Whether the First Circuit's affirmance of the *sua sponte* summary judgment on Respondents' damages claim, which prevented Colegio from arguing and offering evidence on its affirmative defenses to that claim, constitutes a departure from accepted and usual course of judicial proceedings and a violation of Colegio's due process rights.

III. Whether the First Circuit's affirmance of the final judgment awarding damages to the class, despite the failure to provide the requisite notice to the class members before resolution of the case on the merits, and the First Circuit's decision to remand to provide for notice after the fact, is a departure from, and in conflict with, this Court's precedent and a violation of Colegio's due process rights.

PARTIES TO THE PROCEEDING

Petitioner, who was the appellant below, is Colegio de Abogados de Puerto Rico.

Respondents, who were the appellees below, are Herbert W. Brown III, José L. Ubarri and David W. Román.

Petitioner Colegio de Abogados de Puerto Rico is a state-created quasi-public entity with no parent corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE	4
I. OVERVIEW	4
II. RESPONDENTS' CLAIMS AND MOTION FOR SUMMARY JUDGMENT AND COLEGIO'S MOTIONS TO DISMISS	6
III. CLASS CERTIFICATION	7
IV. THE DISTRICT COURT'S POST-CERTIFICATION RULINGS	8
V. THE APPEAL	10

Table of Contents

Page

REASONS FOR GRANTING THE PETITION 11

I. REVIEW IS WARRANTED BECAUSE THE FIRST CIRCUIT'S DECISION TO ALLOW AN INJUNCTION WITHOUT CONSIDERATION OF THE ELEMENTS OF LACK OF IRREPARABLE HARM, ABSENCE OF ADEQUATE LEGAL REMEDY AND INTERVENING CHANGES IN STATE LAW IS IN CONFLICT WITH THIS COURT'S PRECEDENT AND DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS 11

A. The Four-Factor Analysis Required to Issue Injunctions 11

B. The First Circuit Failed to Apply the Four-Factor Test 12

C. The First Circuit Failed to Consider Intervening Changes of State Law ... 16

Table of Contents

Page

II. REVIEW IS WARRANTED BECAUSE THE FIRST CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S *SUA SPONTE* SUMMARY JUDGMENT ON THE DAMAGES CLAIM—WHICH PREVENTED COLEGIO FROM ARGUING AND OFFERING EVIDENCE ON ITS AFFIRMATIVE DEFENSES TO THAT CLAIM—CONSTITUTES A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AND A VIOLATION OF COLEGIO'S DUE PROCESS RIGHTS 18

A. *Sua Sponte* Summary Judgments 18

B. Colegio Had No Notice or Opportunity to Oppose the Summary Judgment on Respondents' Damages Claim 19

Table of Contents

Page

III. REVIEW IS WARRANTED BECAUSE THE FIRST CIRCUIT'S DECISION TO AFFIRM THE FINAL JUDGMENT WITH RESPECT TO THE CERTIFIED CLASSES, DESPITE THE FAILURE TO PROVIDE NOTICE TO THE CLASS MEMBERS BEFORE RESOLUTION OF THE CASE ON THE MERITS, AND ITS DECISION TO REMAND TO PROVIDE FOR THE NOTICE AFTER-THE-FACT IS A DEPARTURE FROM, AND IN CONFLICT WITH, THIS COURT'S PRECEDENT AND A VIOLATION OF COLEGIO'S DUE PROCESS RIGHTS 24

A. The Applicable Law on Prior Notice and Opportunity to Opt Out of Class Seeking Monetary Relief 24

B. The First Circuit Improperly Sanctioned the District Court's Failure to Provide Notice and to Issue Judgment in Accordance With Rule 23 of the Federal Rules of Civil Procedure 27

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 16

Allee v. Medrano,
416 U.S. 802 (1974) 17

Amer. Pipe & Const. Co. v. Utah,
414 U.S. 538 (1974) 26, 27

Amoco Prod. Co. v. Village of Gambell, AK,
480 U.S. 531 (1987) 12

Anderson v. Wachovia Mortg. Corp.,
2010 WL 3528903, (3d Cir. Sept. 13, 2010) ... 20

Brown v. Colegio de Abogados de Puerto Rico,
579 F. Supp. 2d 211 (D.P.R. 2008) 1

Brown v. Colegio de Abogados de Puerto Rico,
613 F.3d 44 (1st Cir. 2010) 1

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 18, 24

Eisen v. Carlisle and Jacquelin,
417 U.S. 156 (1974) 25-26, 27

Ellis v. Brotherhood of Ry., Airline and S.S. Clerks,
466 U.S. 435 (1984) 16

Cited Authorities

Page

Elrod v. Burns,
427 U.S. 347 (1976) 13

Judwin Properties, Inc. v. U.S. Fire Ins. Co.,
973 F.2d 432 (5th Cir. 1992) 18-19, 24

Keller v. State Bar,
496 U.S. 1 (1990) 16

Martinez-Velez v. Rey-Hernandez,
506 F.3d 32 (1st Cir. 2007) 20

Monsanto Co. v. Geertson Seed Farms,
__ U.S. __, 130 S.Ct. 2743 (2010) 12, 14

Ne. Fla. Chapter of Associated General Gen. of Am. v. City of Jacksonville, Fla.,
508 U.S. 656 (1993) 17

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 26, 28

Otis Elevator Co. v. George Washington Hotel Corp.,
27 F.3d 903 (3d Cir. 1994) 18, 24

Pub. Serv. Co. of New Hampshire v. Town of West Newbury,
835 F.2d 380 (1st Cir. 1987) 13

Ramsey v. Coughlin,
94 F.3d 71 (2d Cir. 1996) 19

Cited Authorities

Page

Respect Maine PAC v. McKee,
2010 WL 3861051 (1st Cir. Oct. 5, 2010) 13

Rivera-Ramos v. Roman,
156 F.3d 276 (1st Cir. 1998) 21

Romero v.
Colegio de Abogados de Puerto Rico,
204 F.3d 291 (1st Cir. 2000) 5, 6, 17, 21

Rushia v. Town of Ashburnham, Mass.,
701 F.2d 7 (1st Cir. 1983) 13

Shelby County Health Care Corp. v.
S. Council Indus. Workers Health & Welfare
Trust Fund,
203 F.3d 926 (6th Cir. 2000) 18, 24

Weinberger v. Romero-Barceló,
456 U.S. 305 (1982) 12

Wells Real Estate Inv. Trust II, Inc. v.
Chardon/Hato Rey Partnership, S.E.,
2010 WL 3059519 (1st Cir. Aug. 5, 2010) 20

STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 3, 7, 20

Cited Authorities

Page

P.R. Laws Ann. tit. 4 ..... 4, 10

4 L.P.R.A. § 774 16

RULES

Fed. R. Civ. P. 9, 27, 28

Fed. R. Civ. P. 23(b)(2) 8

Fed. R. Civ. P. 23(b)(3) 8, 24

Fed. R. Civ. P. 23(c) 24, 25, 26

Fed. R. Civ. P. 23(c)(3) 27

Fed. R. Civ. P. 23(d) 26

Fed. R. Civ. P. 26(f) 20

Fed. R. Civ. P. 56(c) 20

U.S. Const. Amend I 2, 5, 13, 27

U.S. Const. Amend V 2

U.S. Const. Amend IV 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Colegio de Abogados de Puerto Rico respectfully requests the Court to grant its Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit ("First Circuit"), issued on July 23, 2010, appears at Appendix ("App.") A to this Petition at 1a to 18a and is reported at *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44 (1st Cir. 2010).

The April 24, 2009, Amended Final Judgment of the United States District Court for the District of Puerto Rico ("District Court"), which is unpublished, appears at App. F at 68a. The unpublished February 3, 2009, Opinion and Order of the District Court, granting in part and denying in part Respondents' Motion to Alter or Amend Judgment, appears at App. B at 19a to 27a. The September 25, 2008 Opinion and Order of the District Court granting Respondents' Motion for Summary Judgment, appears at App. C at 28a to 51a and is reported at *Brown v. Colegio de Abogados de Puerto Rico*, 579 F. Supp. 2d 211 (D.P.R. 2008). The September 25, 2008 Final Judgment of the District Court, appears at App. D at 52a to 53a. The July 31, 2008 Opinion and Order of the United States District Court for the District of Puerto Rico ("District Court") granting Respondents' Motion for Class Certification, appears at App. E at 54a to 67a.

The First Circuit's order denying rehearing of the July 23, 2010 Opinion, which was entered on August 18, 2010, is unpublished and is reproduced at App. G.

JURISDICTION

The First Circuit entered judgment on July 23, 2010, App. A, and denied a timely motion for rehearing on August 18, 2010. App. G. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

> be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S Const. Amend. IV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission

> taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. OVERVIEW

Colegio de Abogados de Puerto Rico ("Colegio"), a state-created quasi-public entity, is an integrated bar association comprising about 12,000 members. App. A at 1a and 10a. Until late 2009, membership with the Colegio was statutorily required for attorneys to practice law before the courts of the Commonwealth of Puerto Rico. P.R. Laws Ann. tit. 4, § 774 (2009). Membership in Colegio has been and continues to be subject to good standing and payment of an annual membership fee by the attorney members. App. C at 30a ¶2 and 36a ¶25.

The issues underlying this case date back to 1994 when Carlos A. Romero, Jr., a member of Colegio, filed suit alleging that Colegio was acting unlawfully by providing him with a life insurance policy funded with part of his annual dues. *Romero v. Colegio de Abogados de Puerto Rico*, Civ. No. 94-2503 (PBS). On February 25, 1999, the District Court granted summary judgment in favor of Colegio and dismissed Romero's claim. *Id.* On appeal, the First Circuit reversed and remanded with

instructions to certify the following question of state law to the Supreme Court of Puerto Rico: is Colegio "authorized to compel members to purchase life insurance coverage through the Colegio as a condition of membership in the bar of Puerto Rico?" (A-94-108)[1] *Romero v. Colegio de Abogados*, 204 F.3d 291 (1st Cir. 2000).

The Supreme Court of Puerto Rico answered the certified question in the affirmative, finding that, pursuant to Puerto Rico law, Colegio was authorized to fund a life insurance policy with part of the annual dues paid by its members. (A-109-114) On remand, however, the District Court permanently enjoined Colegio from collecting from Romero that portion of his annual membership dues destined to fund his coverage in the life insurance program because the court determined that Colegio's compulsory life insurance program was not germane to the purposes that justify an integrated bar association, and was therefore unconstitutional under the First Amendment of the United States Constitution. (A-130); *Romero*, Civ. No. 94-2503 (PBS). The District Court also ruled that Romero was entitled to collect the portion of his annual membership dues attributable to the purchase of his life insurance for the years that he specifically objected to the program. (A-129, 131)

1. This citation to "A" in this petition refers to the appendix filed in the First Circuit.

II. RESPONDENTS' CLAIMS AND MOTION FOR SUMMARY JUDGMENT AND COLEGIO'S MOTIONS TO DISMISS

Respondents, members of Colegio, never filed an objection before Colegio regarding their participation in the life insurance program, nor did they ask to be reimbursed with the portion of their annual membership dues destined to fund their coverage in the life insurance program. (A-783)[2] Nevertheless, on June 27, 2006, they filed the underlying action alleging that, pursuant to the ruling in *Romero*, Colegio had to discontinue the life insurance program. (A-1-185) As putative representatives of a class, Respondents asked the District Court to enter a declaratory judgment and issue an injunctive order, forbidding Colegio from charging its members for the life insurance program. *Id.*

On August 28, 2006, before Colegio had the opportunity to answer the complaint or file a dispositive motion, Respondents filed a motion for summary judgment. (A-241-437) They asked the District Court to: (i) declare that Colegio's mandatory life insurance program was unconstitutional because it was not germane to the purposes that justify an integrated bar association; (ii) declare that Colegio's members may not be forced to pay for life insurance through their annual membership dues; (iii) permanently enjoin Colegio from

2. In late 2005 and early 2006, thirteen members of Colegio asked to obtain a reimbursement or reduction of their membership dues of the portion destined to fund their coverage in the life insurance program for the 2006 membership year. Colegio reimbursed them back in 2006. (A-151-153, 783) *See* App. A, at 3a n.1.

ever charging its members any amount for the purchase of life insurance from their annual dues; (iv) order Colegio to implement a mechanism to notify all its members of the unconstitutionality of its life insurance program, and of their right not to be forced to pay for it through their membership dues; and (v) order defendants to pay for their costs and attorney's fees. (A-242)

In the interim, Colegio's Governing Board unanimously decided to permanently discontinue its group life insurance program. (A-442) Based on the Board's decision, Colegio moved to dismiss the action for want of jurisdiction on September 1, 2006. (A-438-442)

On December 4, 2006, while those dispositive motions were pending, Respondents filed an amended complaint to include a multimillion dollar claim under 28 U.S.C. § 1983 ("Section 1983") for damages allegedly resulting from Colegio's presumptive constitutional tort. (A-495-519) Colegio moved to dismiss the amended complaint on January 26, 2007. (A-539-544)

Respondents never amended their motion for summary judgment to include a request for judgment on their damages claim.

III. CLASS CERTIFICATION

Respondents filed a motion to certify the class on April 28, 2008. (A-602-11) *See also* A-612-14. Colegio opposed the motion, based on its pending motion to dismiss for lack of jurisdiction. (A-614-16) As noted in

the opposition, if the court denied the motion to dismiss, the matter would have required compliance with Rule 23 (c) of the Federal Rules of Civil Procedure, before the court made a decision on the merits. *Id.* at A-615 n.1.

On July 31, 2008, the District Court issued an order certifying a "declaratory class" pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, and a "damages class" pursuant to Rule 23(b)(3). App. E. The District Court, however, did not direct Respondents to send any notice to the members of the class and no notice was sent by Respondents after the class was certified. *See id.*

IV. THE DISTRICT COURT'S POST-CERTIFICATION RULINGS

The District Court denied Colegio's motion to dismiss on June 18, 2008, ruling that: (i) Colegio did not meet its burden of demonstrating that the issue had been rendered moot; and (ii) Respondents had established a redressable constitutional injury. (A-636-648) Thereafter, in compliance with the schedule established by the District Court, Colegio answered the amended complaint on July 1, 2008, asserting, among others affirmative defenses, that Section 1983 does not provide for the imposition of vicarious liability and that Respondents' damages claim was time-barred by the applicable statute of limitations. (A-662) On July 11, 2008, Colegio opposed Respondents' motion for summary judgment. (A-674-697)

On September 26, 2008, the District Court granted Respondents' motion for summary judgment and entered a final judgment in their favor. App. C & D. The

District Court permanently enjoined Colegio from collecting the portion of its members' future annual dues that was to be used for the insurance program. App. C at 50a, & D. The District Court also adjudicated Respondents' claim for damages, although that claim had not been submitted for summary disposition and Colegio had no notice or opportunity to present evidence to defend itself against the claim. App. C at 48a and 50a. The court ruled that the "damages class" is entitled to "the amount of their annual dues allocated by [Colegio] toward the compulsory group life insurance program from October 9, 2002, until the present; plus interest, costs, and attorneys' fees." App. C at 50a.

The judgment was entered without notice to either the "declaratory class" or the "damages class," as mandated by Rule 23 of the Federal Rules of Civil Procedure. *See* App. A at 10a-11a (First Circuit recognizing lack of notice). And, at the time the judgment was entered, the parties had not held a Rule 26(f) conference and the District Court had not issued a scheduling order. *See* Colegio's opening brief before First Circuit, at 16; Colegio's rehearing petition before the First Circuit, at 6.[3]

Colegio appealed the final judgment on October 7, 2008. (A-802-803) Three days later, Respondents moved to alter the judgment to seek punitive damages. (A-817-22) On February 4, 2009, the District Court denied the request for punitive damages. App. B. In that same

3. The only discovery that had taken place at the time the judgment was entered was the commencement of a non-party's deposition.

order, the court instructed Colegio to disclose the amount of funds allocated for the premiums of the institution's former life insurance program from 2002 until the date of the order. App. B at 24a-25a. Colegio filed an Amended Notice of Appeal on February 5, 2009, seeking review of the February 4, 2009 order. (A-947-48)

On April 27, 2009, the District Court entered an amended final judgment, awarding the "damages class" $4,156,988.70, plus interest, costs, and attorney's fees. App. F. Colegio filed a Second Amended Notice of Appeal on March 21, 2009, seeking review of the amended final judgment. (A-1056-57)

V. THE APPEAL

While the appeal before the First Circuit was pending (but after Colegio had filed its opening brief), the Puerto Rico legislature enacted a law that converted Colegio from a compulsory bar association into a voluntary bar association. Law No. 121 of October 13, 2009 and Law No. 135 of November 6, 2009, which amended, *inter alia*, P.R. Laws Ann. tit. 4, § 774 (2010) (membership with the Colegio no longer required as a condition to the practice of law in Puerto Rico). The parties advised the First Circuit of this development in their appellate briefs. Respondents' Opening Brief, at 38 n.7; Colegio's Reply Brief, at 11.

On July 23, 2010, the First Circuit affirmed the District Court's judgment, holding that: (i) the request for an injunction had not been rendered moot, because there was "a fear of repetition" by Colegio in establishing the insurance program; (ii) the risk that

Colegio would continue to repeat its conduct was sufficient to support the entry of a permanent injunction, regardless of the presence or absence of irreparable harm; (iii) Colegio waived its objection regarding the District Court's *sua sponte* adjudication of the damages claim without notice and opportunity to conduct discovery; (iv) although the District Court was required to provide notice to the class members prior to resolution of the case on the merits, remand was proper to allow for notice to be given after the fact. App. A.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE FIRST CIRCUIT'S DECISION TO ALLOW AN INJUNCTION WITHOUT CONSIDERATION OF THE ELEMENTS OF LACK OF IRREPARABLE HARM, ABSENCE OF ADEQUATE LEGAL REMEDY AND INTERVENING CHANGES IN STATE LAW IS IN CONFLICT WITH THIS COURT'S PRECEDENT AND DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

A. The Four-Factor Analysis Required to Issue Injunctions

It is well established that "a plaintiff seeking a permanent injunction *must* satisfy a four-factor test before a court may grant such relief," by demonstrating:

> (1) that it has suffered an irreparable injury;
> (2) that remedies available at law, such as monetary damages, are inadequate to

> compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, __ U.S. __, 130 S.Ct. 2743, 2757 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)) (emphasis added). This standard is applicable to both preliminary and permanent injunctions. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987).

Indeed, "[a]n injunction should issue *only* where the intervention of a court of equity 'is essential in order effectually to protect property rights *against injuries otherwise irremediable.*'" *Weinberger v. Romero-Barceló*, 456 U.S. 305, 312 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)) (emphasis added). As recognized in *Weinberger*, this "Court has repeatedly held that the basis for injunctive relief in the federal courts has always been *irreparable injury and the inadequacy of legal remedies.*" 456 U.S. at 312 (emphasis added).

B. The First Circuit Failed to Apply the Four-Factor Test

The First Circuit did not find that there was irreparable harm nor did it find that there is presumptive irreparable harm in cases involving unconstitutional conduct, as had been alleged by

Respondents. Quite the contrary, the First Circuit stated that it was not "even considering the relevance of First Amendment rights," and raised—in a footnote—conflicting case law on that particular issue. App. A at 8a.[4] The court also did not even mention whether there was an adequate legal remedy available. Instead, the court relied solely on its conclusion that the risk that members would be forced to bring new law suits, possibly every year, was sufficient to support entry of a permanent injunction. *Id.*[5] The court did not cite any

4. In dicta, the First Circuit recognized this Court's holding that "the loss of First Amendment freedoms" constitutes "irreparable injury" in the context of a case involving loss of employment, under *Elrod v. Burns*, 427 U.S. 347, 373 (1976). App. A at 8a n.4. The court also recognized, however, that asserting First Amendment rights does not automatically require a finding of irreparable injury, citing *Rushia v. Town of Ashburnham, Mass.*, 701 F.2d 7 (1st Cir. 1983), and *Pub. Serv. Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (same). *Id.* Indeed, in *Respect Maine PAC v. McKee*, 2010 WL 3861051, 1 (1st Cir. Oct. 5, 2010), the First Circuit recently held that, whether there is irreparable harm stemming from violation of First Amendment rights is an issue that depends on the particular facts of the case. Neither the District Court nor the First Circuit analyzed the existence of irreparable harm in the context of the particular facts involved here.

5. In its Reply Brief, Colegio had argued that the Puerto Rico Legislature recently enacted a law that converts Colegio into a voluntary association, and therefore, the germane test under the U.S. Constitution is no longer applicable to Colegio. Colegio's Reply Brief, at 11. The First Circuit did not consider the constitutional argument in deciding whether the injunction was proper, nor did the court consider that the issue actually may have become moot during the appeal, requiring the First Circuit to address the issue. Instead, the First Circuit dismissed

(Cont'd)

supporting authority for the proposition that the risk of repetition, without more, justifies a party's failure to prove the elements of irreparable harm or lack of adequate legal remedy.

The fact is that any purported damages, if actually suffered by Respondents and other members of the certified class, are quantifiable and therefore not irreparable. Here, there plainly exists an adequate remedy at law, as evidenced by the fact that the District Court quantified monetary damages in the amount of $4,156,988.70.[6]

Therefore, the First Circuit essentially held that plaintiffs need not prove the two most essential elements required prior to granting injunctive relief merely where there is a risk that the conduct complained of could be repeated. That holding is clearly contrary to this Court's long-established precedent, *see, e.g. Monsanto*, 130 S.Ct. at 2757, and it improperly conflates the principles of justiciability (*e.g.*, mootness) required in all cases, with the four-prong injunction analysis to relieve Respondents of their burden of proof.

The First Circuit also failed to consider that Respondents actually failed to meet their burden to prove that the class would suffer irreparable harm in

(Cont'd)
this argument, noting that there was "nothing in the record about such matters," but on remand Colegio is "free to ask the district court to consider [it] and seek dismissal of the injunctive element of the relief granted on the ground that it is no longer appropriate." App. A at 9a.

6. The District Court explained that the monetary damages constituted a "fair compensation" of the damages incurred. App. Cm at 48a.

the absence of injunctive relief. The court acknowledged that "[p]erhaps some members of the class wanted the insurance, were even willing to have part of their payment go to Colegio rather than the insurer, and would have purchased it even if a box on the dues notice made the purchase optional." App. A at 15a. But the court faulted *Colegio* for not providing the "practical means to distinguish" those members of the class who did not want insurance (*i.e.*, those who conceivably suffered a harm) from those who did (*i.e.*, those who did not suffer a harm). Thus, despite the fact that Respondents bore the burden to prove irreparable harm, the court essentially held that the entire class should be considered to have suffered a harm because *Colegio* purportedly failed to demonstrate which of the 12,000 members wanted the insurance program. The unreasonableness of this analysis is exacerbated by the court's hasty dismissal of the uncontested evidence submitted by Colegio that its members had rejected the class action suit filed by Respondents[7] and the possibility that 99.9% of the Colegio members[8] actually may have

7. Colegio submitted a resolution passed by Colegio's General Assembly on October 18, 2008, whereby the General Assembly rejected the class action suit filed by Respondents. (A-872-875) *See also* App. A at 10a and n.5. It is uncontested that the meeting was properly called, that the agenda included the discussion of this case, and that the membership was advised that the attorneys in attendance would constitute a quorum. Petition for Rehearing at 7.

8. As noted above, thirteen members of Colegio had previously objected to the insurance and sought reimbursement of the portion of their membership dues allocated to the payment of the premium. *See* note 2, *supra*. Considering those members, Carlos Romero Jr. and the three plaintiffs involved in this case, there is evidence of only 17 of a total of approximately 12,000 members (*i.e.*, .1% of the membership) who have voiced *any* concern with Colegio's insurance program.

wanted the insurance and therefore did not suffer any harm—much less the requisite irreparable harm.

C. The First Circuit Failed to Consider Intervening Changes of State Law

The First Circuit improperly ignored that Colegio was converted into a *voluntary* bar association after the filing of the appeal, following the enactment of Law No. 121 of October 13, 2009 and Law No. 135 of November 6, 2009, amending *inter alia* 4 L.P.R.A. § 774, a fact which was asserted and *admitted* by both Respondents and Colegio. Opening Brief filed by Respondents in First Circuit, at 38 n.7; Colegio's Reply Brief, at 11. This has unquestionably rendered the "germaneness" principles under the First Amendment irrelevant here, thereby eliminating any possible risk of constitutional harm to any members of Colegio in the future.[9] In fact, by allowing complaining members to disassociate themselves from Colegio at any time, the new legislation has opened the door for those members to avoid any purported harm—to the extent there exists any real risk that the program would be reinstated in the future.

9. This Court has held that conditioning the practice of law on membership in an integrated bar association does not itself violate the First Amendment, because the state's interest in regulating the legal profession justifies such compelled membership. *Keller v. State Bar*, 496 U.S. 1, 7-9, 13 (1990). The Court has also held that attorneys may be compelled to pay for such membership. *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 447-48 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222-23 (1977). Under the "germaneness" principle, however, attorneys who are forced to belong to an integrated bar association cannot be compelled to contribute to "ideological activities not 'germane' to the purpose for which compelled association [is] justified." *Keller*, 496 U.S. at 13.

The First Circuit acknowledged that Colegio may actually "no longer be prohibited by *Romero* from operating a mandatory life insurance program." App. A at 9a. Nevertheless, the court refused to address this issue or to reverse the injunction order, instead noting that "Colegio is free to ask the district court to consider them and seek dismissal of the injunctive element of the relief granted on the ground that it is no longer appropriate." *Id.* In doing so, the First Circuit abdicated its responsibilities by refusing to recognize that the issue had become moot, as a matter of law.

In light of the intervening change in state law, the First Circuit should have *at the very least* vacated the injunction order to allow the District Court to reconsider the issue. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 672 (1993) (where changes in the law might alter significantly the character of the system considered by court below and where it is unclear how the new procedures would operate, vacation of lower court's judgment and remand for reconsideration in light of the intervening changes in state law is proper); *see also Allee v. Medrano*, 416 U.S. 802, 818-820 (1974) (where criminal statutes declared unconstitutional were replaced by "more narrowly drawn" versions, case was moot absent pending prosecutions).

II. REVIEW IS WARRANTED BECAUSE THE FIRST CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S *SUA SPONTE* SUMMARY JUDGMENT ON THE DAMAGES CLAIM—WHICH PREVENTED COLEGIO FROM ARGUING AND OFFERING EVIDENCE ON ITS AFFIRMATIVE DEFENSES TO THAT CLAIM—CONSTITUTES A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AND A VIOLATION OF COLEGIO'S DUE PROCESS RIGHTS.

A. *Sua Sponte* Summary Judgments

This Court has acknowledged a district court's "power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (citations omitted; emphasis added). The circuits are generally in agreement that no summary judgment may be issued sua sponte, unless the adverse party is given prior notice and an opportunity to oppose the issues with all of the evidence. *See, e.g., Shelby County Health Care Corp. v. S. Council Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 931 (6th Cir. 2000) ("Fed. R. Civ. P. 56(c) mandates that the losing party must 'be afforded notice and reasonable opportunity to respond to all the issues to be considered by the court'"); *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903 (3d Cir. 1994) ("[u]nder our cases, a district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose summary judgment"); *Judwin Properties, Inc. v. U.S. Fire Ins.*

Co., 973 F.2d 432, 436-437 (5th Cir. 1992) (a district court may grant a motion for summary judgment sua sponte, provided that it gives proper notice to the adverse party and the opportunity to that party to present its case to the district court prior to dismissal); see also *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir. 1996) (sua sponte grant of summary judgment may be appropriate if "all of the evidentiary materials that a party might submit in response to a motion for summary judgment are before the court" and such materials show that no material dispute of fact exists).

Indeed, the First Circuit itself has held that, "[g]iven the potential unfairness of this practice, . . . the district court may summarily decide a claim on its own initiative only if two conditions are met: First, discovery must be sufficiently advanced that the parties have enjoyed a reasonable opportunity to glean the material facts. Second, the court must first give[ ] the targeted party appropriate notice and a chance [in accordance with the rules] to present its evidence on the essential elements of the claim or defense." *Wells Real Estate Inv. Trust II, Inc. v. Chardon/Hato Rey Partnership, S.E.*, 2010 WL 3059519, *7 (1st Cir. Aug. 5, 2010).

B. Colegio Had No Notice or Opportunity to Oppose the Summary Judgment on Respondents' Damages Claim

Respondents' motion for summary judgment was filed *before* the complaint was amended to add a damages claim. When Respondents renewed their motion for summary judgment after the amended complaint was filed, they did not seek resolution of their damages claim

on summary judgment, nor did they seek any kind of monetary relief at that time, for that matter. The District Court nonetheless entered a *final judgment* resolving the entire litigation — including the damages claim — *without affording Colegio any prior notice that such claim would be resolved or the opportunity to defend itself against that claim.* Indeed, at the time the final judgment was issued, the conference under Fed. R. Civ. P. 26(f) had not yet been held and no scheduling order had been issued and, with the exception of the commencement of a non-party's deposition, no discovery had been conducted. Therefore, the District Court also did not afford any opportunity for the record to become fully developed. *Anderson v. Wachovia Mortg. Corp.*, 2010 WL 3528903, *15 (3d Cir. Sept. 13, 2010) (notice under Fed. R. Civ. P. 56(c) requires "the presence of a fully developed record" and lack of prejudice to the losing party) (citations omitted).

Because Colegio was not afforded the notice and opportunity to oppose the summary adjudication of the damages claim, it did not develop *any substantive defenses to the damages claim.* For example, Colegio was not afforded the opportunity to develop the argument (or offer evidence in support thereof) that Colegio could not be found vicariously liable under Section 1983 because the statute does not confer substantive federal rights; rather, the statute provides a remedy against the specific persons directly involved in the wrongdoing. *See Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32 (1st Cir. 2007). Colegio was also not allowed to develop the argument (or offer evidence in support thereof) that the majority of the damages claims were barred by virtue of the applicable one-year

statute of limitations. *See Rivera-Ramos v. Roman*, 156 F.3d 276, 282 (1st Cir. 1998).[10] Additionally, Colegio was unable to address the extent of the damages (or offer evidence in support thereof), including the claim that, unlike the plaintiff in *Romero*, the "damages class" in the underlying case is comprised of non-objecting members who wanted and benefitted from the life insurance protection and therefore did not suffer any damages.

The First Circuit nonetheless upheld the District Court's judgment, holding that Colegio waived its objection to the *sua sponte* summary adjudication and the substantive arguments it may have offered in defending itself against the damages claim. The First Circuit stated:

> When the district judge proposed that Colegio return the premiums it had charged after *Romero* held the insurance program unlawful, Colegio had ample opportunity to state its objections and explain what discovery or other proceedings it needed. Instead, in the course of a number of filings made after the

10. Although Section 1982 does not provide a limitations period, the First Circuit has held that, in cases arising in Puerto Rico, the one-year statute of limitations provided under the Puerto Rico Civil Code for tort actions will apply. *Rivera-Ramos*, 156 F.3d at 282. The damages awarded by the District Court against Colegio cover the membership years 2002 through the termination of the insurance program in 2006. Therefore, since the complaint was filed in 2006, *three-fourths of the claims* of the damages class members are time-barred by the one-year statute of limitations; the District Court's error is thus quite significant.

> district court's request for data as to the premiums, Colegio's contention was simply that it owed nothing because the class members had not objected to paying for insurance and had benefitted from coverage.

App. A at 14a. But the District Court's "proposal" was made months *after* the final judgment was entered on all the claims — including the *sua sponte* adjudication on the damages claim, which the court entered without notice to Colegio, before virtually any discovery had been conducted, and without giving Colegio an opportunity properly to defend against the damages claim. Indeed, by the time the so-called proposal was made, Colegio had since filed the notice of appeal, seeking review of the final judgment.[11]

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11. As noted above, the final judgment was entered on September 26, 2008 and the notice of appeal was filed on October 7, 2008. (A.-802-803) Three days later, Respondents filed a motion to alter the judgment to include punitive damages. On February 4, 2009, the District Court denied the motion, yet ordered Colegio to inform the amount of funds allocated for the premiums of the institution's former life insurance program from 2002 until the date of the Order. App. B, at 24a-25a. This constitutes the so-called "proposal" by the District Court. Notably, Colegio filed an Amended Notice of Appeal the very next day to include the February 4, 2009 order. (A-947-948) On April 27, 2009, the District Court amended the final judgment, holding Colegio liable to the "damages class" for damages in the amount of $4,156,988.70, plus interest, costs, and attorney's fees. App. E. On March 21, 2009, Colegio filed its Second Amended Notice of Appeal. (A-1056-1057) Therefore, instead of "forfeiting" any arguments, as the First Circuit held, Colegio acted in a timely fashion to protect its rights.

The First Circuit cited no legal authority that required Colegio first to challenge the final judgment in the District Court or face waiver. As noted above, the accepted and usual course of proceedings is to provide for notice and opportunity to oppose prior to issuance of a *sua sponte* summary judgment. It is unreasonable and contrary to the accepted and usual course of judicial proceedings to conclude — as the First Circuit did — that Colegio forfeited its right to proper notice after the harm resulting from the failure to provide such notice had already been inflicted through a final judgment. It is similarly unreasonable and illogical to conclude that Colegio forfeited arguments that it never had the opportunity to raise before the final judgment was entered, including the issue of vicarious liability, statute of limitations and the extent of damages, especially in light of the fact that some (if not most) members of Colegio may have actually wanted the insurance policy at issue or did not have any objection to paying the insurance premium.[12]

This Court's intervention on certiorari is warranted because the First Circuit's decision establishes a dangerous precedent that would allow the district courts within that circuit to issue *sua sponte* final summary judgments, without affording the losing party any notice or the opportunity to conduct discovery, as needed, and

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12. In fact, in its opposition to the motion for summary judgment, Colegio advised the District Court that it intended to raise its defenses to the claim for damages in "due course." (A-697 n.2) The due course was never followed by the District Court and Colegio was never afforded the opportunity to address its defenses prior to the issuance of the final judgment.

establish its substantive defenses. In so doing, the First Circuit has departed from this Court's precedent in *Celotex*, 477 U.S. 317, and is in open conflict with its sister circuits, *see, e.g., Shelby County Health Care*, 203 F.3d at 931; *Otis Elevator*, 27 F.3d 903; *Judwin Properties*, 973 F.2d at 436-437.

III. REVIEW IS WARRANTED BECAUSE THE FIRST CIRCUIT'S DECISION TO AFFIRM THE FINAL JUDGMENT WITH RESPECT TO THE CERTIFIED CLASSES, DESPITE THE FAILURE TO PROVIDE NOTICE TO THE CLASS MEMBERS BEFORE RESOLUTION OF THE CASE ON THE MERITS, AND ITS DECISION TO REMAND TO PROVIDE FOR THE NOTICE AFTER-THE-FACT IS A DEPARTURE FROM, AND IN CONFLICT WITH, THIS COURT'S PRECEDENT AND A VIOLATION OF COLEGIO'S DUE PROCESS RIGHTS.

A. The Applicable Law on Prior Notice and Opportunity to Opt Out of Class Seeking Monetary Relief

On August 1, 2008, the District Court certified the "damages class" pursuant to Fed. R. Civ. P. 23(b)(3) ("Rule 23(b)(3)"). App. E. Rule 23(c) of the Federal Rules of Civil Procedure requires that,

> [f]or any class certified under Rule 23(b)(3), the court *must* direct to class members the best notice that is practicable under the circumstances, including individual notice to

> all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> > (i) the nature of the action;
> >
> > (ii) the definition of the class certified;
> >
> > (iii) the class claims, issues, or defenses;
> >
> > (iv) that a class member may enter an appearance through an attorney if the member so desires;
> >
> > (v) that the court will exclude from the class any member who requests exclusion;
> >
> > (vi) the time and manner for requesting exclusion; and
> >
> > (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c). "[T]he import of this language [in Rule 23(c)] is unmistakable. Individual notice *must* be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173 (1974) (emphasis added); *see also Amer. Pipe & Const. Co. v.*

Utah, 414 U.S. 538, 547-548 (1974) ("[o]nce it is determined that the action may be maintained as a class action under [Rule 23(b)(3)], the court is *mandated* to direct to members of the class the best notice practicable") (emphasis added).

The notice requirement is "not merely discretionary" and "is designed to fulfill requirements of due process to which the class action procedure is of course subject." *Eisen*, 417 U.S. at 173 (quoting Advisory Committee Notes). As this Court has observed, "notice and an opportunity to be heard [are] fundamental requisites of the constitutional guarantee of procedural due process," and therefore "must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 174 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Each class member may thereafter move to "intervene and present claims or defenses, or to otherwise come into the action" to protect their individual rights. Fed. R. Civ. P. 23(d). Indeed, due process requires not only that each class member receive notice but that they are given the "opportunity to be heard and participate in the litigation" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999).

Rule 23(c) also provides that, "[w]hether or not favorable to the class, the judgment in a class action *must* . . . for any class certified under Rule 23(b)(3), *include and specify or describe those to whom the Rule 23(c)(2) notice was directed*, who have not requested

exclusion, and whom the court finds to be class members." Fed. R. Civ. P. 23(c)(3) (emphasis added); *see Amer. Pipe & Const.*, 414 U.S. at 549 ("in Rule 23(b)(3) actions, the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion").

B. The First Circuit Improperly Sanctioned the District Court's Failure to Provide Notice and to Issue Judgment in Accordance With Rule 23 of the Federal Rules of Civil Procedure

In this case there was no notice given to the "damages class," such that the purported class members were not apprised of the pendency of the action and were not afforded the opportunity to opt out of the class or intervene. *See, e.g.*, *Eisen*, 417 U.S. at 174. The District Court nonetheless entered *final judgment* in favor of the entire class and against Colegio for $4,156,988.70, plus interest. App. C and F. The First Circuit, although recognizing that the District Court was required to give notice, affirmed the judgment and sought to cure the error by remanding the case after the fact to the District Court to comply with Rule 23's requirements. App. A.[13]

13. To date, no notice has been given to the class. It is noteworthy that last Friday, November 11, 2010, the District Court issued an order relating to the notice. Among other things, the District Court held that Colegio will bear the cost of providing the class notice. By means of the order, the District Court also issued another injunction essentially prohibiting Colegio from engaging in any communication with its members in connection with this case until after notice has been provided and the opt out procedures have been completed. *See Brown v. Colegio de Abogados*, Civil No. 06-1645 (JP). Colegio intends to challenge that order in due course to, among other things, defend and protect its First Amendment rights.

There is no way to rectify this, other than to reverse the judgment. Due process required that the purported class members be given notice and the opportunity to opt out of the damages class. *See, e.g.*, *Ortiz*, 527 U.S. at 847. The uncontested record evidence shows, and the First Circuit recognized, that individual members of the class could actually prefer to support Colegio and not the Respondents. App. A at 15a and *supra* note 7. Indeed, of the approximate 12,000 Colegio members, only 17 (or about .1%) have voiced *any* concern with Colegio's insurance program. *See supra* note 6. The First Circuit nonetheless decided (on behalf of every single member of the class) that they obtained "the best relief imaginable" by obtaining a judgment against Colegio for reimbursement of the premiums paid. It was not for the First Circuit (or the District Court) to replace each individual member's judgment with its own. On remand, the class members are bound to either accept or reject the final judgment of the District Court, now with the incentive of an award in their favor. The First Circuit's ruling that the District Court's error could be cured after the fact ignores the harm that has already been inflicted on Colegio, which is subject to a judgment that requires it to pay substantial sums of money to members who may have no claims, in violation of Colegio's due process rights.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 16, 2010

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DECIDED JULY 23, 2010

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 08-2432

HERBERT W. BROWN III; JOSÉ L. UBARRI; DAVID W. ROMÁN,

Plaintiffs, Appellees,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

Defendant, Appellant.

Heard May 3, 2010
Decided July 23, 2010

Before LYNCH, Chief Judge, BOUDIN and LIPEZ, Circuit Judges.

BOUDIN, Circuit Judge.

Colegio de Abogados de Puerto Rico ("Colegio") is a state-created, integrated bar association; membership has been statutorily required in order to practice law before the Commonwealth of Puerto Rico's courts. P.R. Laws Ann. tit. 4, § 774 (2009). At the time the present dispute began, Colegio had for many years provided compulsory life insurance to its members, funded by a

portion of their annual dues. The present appeal is the latest phase of litigation stemming from this compulsory insurance.

The procedural history traces back to a law suit filed in 1994. Carlos Romero, Jr., a Colegio member, claimed that the organization was acting unlawfully by requiring him to purchase life insurance in order to practice before Puerto Rican courts. The district court granted summary judgment in Colegio's favor and dismissed the claim in 1999 but was reversed on appeal by this court. *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 295-96, 304-06 (1st Cir.2000).

This court held that the First Amendment allowed Colegio to compel its members to purchase life insurance only if this was germane to the purposes that justify compelling membership in an integrated bar association, *id.* at 302; but, to avoid needlessly deciding a constitutional question, we directed the district court to certify the question of Colegio's authority, *id.* at 305-06. The Puerto Rico Supreme Court affirmed that authority as a matter of local law. The district court then held that the life insurance program was not germane and was therefore unconstitutional, awarded Romero damages-the amount of his dues attributable to the life insurance program since he had initially objected-and entered an injunction "prohibit[ing] [Colegio] from collecting ... that portion of his future annual dues attributable to the Colegio's mandatory group life insurance program." *Romero v. Colegio de Abogados de Puerto Rico*, No. 94-2503, slip op. at 9, 14-16 (D.P.R. Sept. 26, 2002).

Appendix A

Despite the injunction, Colegio continued to provide life insurance funded by its members' annual dues after the district court's decision became final, and although mentioning the decision in its 2003 and 2004 Treasurer's Reports, did not otherwise advise its members that insurance need no longer be purchased. In late 2005 and early 2006, two groups of attorneys requested and received reimbursements for those dues attributable to their life insurance coverage, but only after much delay by Colegio.[1]

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1. The first group of attorneys requested that they be excused from participating in the life insurance program on November 30, 2005. Colegio did not issue a response by the deadline for attorneys to pay their annual dues, so the group paid in full. On February 2, 2006, Colegio said that it would reimburse their premiums only on various conditions, including that the attorneys make a new request to be excluded every year-the claim being that one board could not bind the next-and that their reimbursement not serve as precedent for future cases. The attorneys refused and Colegio eventually refunded their premiums on March 3, 2006.

A second group requested on February 27, 2006 that Colegio refund the portion of their 2006 dues attributable to the life insurance program. Colegio submitted the matter to a review board and there argued that the *Romero* decision "is not extensive to other Bar Association members"; that the attorneys' request was untimely because it occurred after their 2006 dues had already been paid; and that the board should allow it to reimburse the attorneys with vouchers for Colegio seminars, books or other programs rather than cash. Colegio eventually reimbursed the attorneys the dues for the portion of their 2006 coverage "unearned" by the insurer.

Appendix A

The named plaintiffs in this law suit are Colegio members who neither objected to their participation in Colegio's life insurance program nor requested reimbursement. They filed this class action on June 27, 2006, requesting declaratory judgment and an injunction forbidding Colegio from charging its members for life insurance; the complaint was later amended to add a claim for damages reflecting forced participation in the program between the 2002 *Romero* decision and the time the program was eventually canceled. The plaintiffs sought to certify two classes, one for damages and another for declaratory relief, and moved for summary judgment, arguing that *Romero* had preclusive effect.

Colegio ended its life insurance program on August 29, 2006, and then filed a motion to dismiss, arguing that the case was now moot. The district court denied its motion, finding that "Colegio's prior pattern of contradictory behavior [left] the Court with no assurance that the alleged constitutional violations [would] not recur." On July 31, 2008, the court certified both of the requested classes: a declaratory class encompassing all present and future Colegio members, and a damages class consisting of attorneys who were members between the conclusion of the *Romero* litigation in 2002 and the ending of the life insurance program in 2006.

Not long afterwards, the district court granted summary judgment for the plaintiffs, finding (based on

non-mutual offensive collateral estoppel[2]) that Colegio's compulsory life insurance program violated the federal constitution. The court then issued a permanent injunction barring Colegio from using its members' annual dues for purposes of operating the compulsory life insurance program, later amending its judgment to add damages in the amount of $4,156,988.70, plus costs, interest and attorneys' fees. Colegio now appeals.

Colegio's jurisdictional objection, which we consider first, is that the case is moot because, after this law suit began, it ceased to offer life insurance. *See Iron Arrow Honor Soc'y v. Heckler,* 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983) ("Federal courts lack jurisdiction to decide moot cases...."); *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979). The district court found that it was "not 'absolutely clear' that the Colegio [would] permanently enforce its internal decision to eliminate the compulsory life insurance component from the annual dues collection."

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2. Non-mutual offensive collateral estoppel, now usually called issue preclusion, is a branch of res judicata doctrine which prevents in certain circumstances re-litigation of issues previously decided against one of the parties. Application is "non-mutual" where the party asserting preclusion was not a party to the prior case, and it is termed "offensive" when used by a plaintiff to bind a defendant. *See Acevedo-Garcia v. Monroig,* 351 F.3d 547, 573-75 (1st Cir.2003); Wright, Miller & Cooper, *18A Federal Practice and Procedure* § 4464 (2d ed.2002).

The substantive standard for mootness is variously expressed in the cases; behavior certain not to recur ought not be enjoined, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), but absent such certainty, likelihood of reoccurrence might not be the only factor to be considered. *E.g., Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48, 54 (1st Cir.2004)(ability of a harm to evade review). As for the standard of appellate review, some cases speak of *de novo* review without qualification although conceivably factual findings might deserve some deference.[3]

We need not resolve these issues because, even if review were entirely *de novo* and confined purely to risk of repetition, the district court's conclusion is sound. Indeed, as a general rule of thumb, a defendant may not render a case moot by voluntarily ceasing the activity of which the plaintiff complains; were the opposite true, a defendant could immunize itself from suit by altering its behavior so as to secure a dismissal, and then immediately reinstate the challenged conduct afterwards. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152

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3. *Compare Ramirez v. Sanchez Ramos*, 438 F.3d 92, 96-97 (1st Cir.2006)("We review ... mootness determination[s] *de novo*, accepting as true the material factual allegations contained in the complaint ...."), *with Adams v. Bowater Inc.*, 313 F.3d 611, 613 (1st Cir.2002) ("[W]here the district court applies an abstract standard to known facts, the extent of deference accorded on review varies from substantial deference to none at all, depending on the subject matter and on other circumstances.").

(1982); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

Nevertheless, a case may become moot if the defendant meets the "heavy burden" of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. at 189, 120 S.Ct. 693 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)); *see also Adams*, 313 F.3d at 613. But Colegio's past obstinacy and its own claims that one board's action does not bind the next (see note 1, above) justify a fear of repetition.

After *Romero*, Colegio did not fully advise its members that they no longer had to buy insurance, threw obstacles in front of those trying to opt out, and delayed refunds. In fact it moved to disbar one member who refused to pay the portion of his dues attributable to the program, *see In re Rivera*, No. TS-9645, 2006 WL 3782863 (P.R. Nov. 14, 2006). This sorry record answers the claim of mootness and also defeats any claim that the district court abused its discretion on the separate issue of whether as a matter of discretion an injunction was warranted.

In a related argument against the injunction, Colegio says that it was wrongly granted because there was no irreparable harm, ordinarily a requirement for such relief. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006).

In particular, Colegio claims that the damages are quantifiable and hence not "irreparable," and that the plaintiffs suffered no injuries because they received the benefit of the life insurance policy and because objectors were ultimately reimbursed. The first part of the argument is readily disposed of; the second part is complicated.

When a preliminary injunction is sought, the merits are often an open question and, where it is clear that damages are easily determined, this may well counsel against injunctive relief. But where the merits have been determined and repetition is a risk, it is fanciful to argue that a vast number of members should be relegated to bringing law suits-possibly every year based on Colegio's notion that one board does not bind another. This is sufficient without even considering the relevance of First Amendment rights.[4]

Colegio now claims in its brief that the Puerto Rico legislature has recently enacted a law converting Colegio into a voluntary bar association. Depending on Colegio's

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4. *Compare Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), *with Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir.1983) (distinguishing *Elrod* as not involving an injunction against a state criminal prosecution and holding that "the fact that [the plaintiff] is asserting First Amendment rights does not automatically require a finding of irreparable injury"). *See also Pub. Serv. Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir.1987).

new status-most importantly, whether it is truly voluntary-it may no longer be prohibited by *Romero* from operating a mandatory life insurance program. But there is nothing in record about such matters. On remand, Colegio is free to ask the district court to consider them and seek dismissal of the injunctive element of the relief granted on the ground that it is no longer appropriate.

This brings us to damages. The district court granted class certification-relevant primarily to damages since an injunction and declaratory judgment could have been granted to any named plaintiff-and ultimately awarded large damages to the class. The damages, of course, are unaffected by any argument about mootness based on the new statute. But Colegio challenges both the class certification and the damages award itself on numerous grounds.

Colegio's first argument-that the district court should have allowed discovery before class certification-is forfeit because it was never raised in the district court. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir.1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992). When plaintiffs moved to certify two classes, Colegio asked to reserve the right to oppose certification if its jurisdictional challenges failed, but after the district court rejected those challenges, Colegio failed to raise any substantive objections to certification.

Colegio next argues that the class representatives do not adequately represent the interests of the class

as required by Rule 23(a)(4) and points to an October 18, 2008, resolution passed at a membership meeting opposing the present law suit.[5] Courts may alter certification orders prior to final judgment, Fed.R.Civ.P. 23(c)(1)(C), *cf. Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir.1986), but the vote is an inadequate basis for reconsideration, especially when circumstances of the resolution are considered.

It appears from the record that the meeting that adopted the resolution was attended by only a few hundred of Colegio's 12,000 members; an affidavit suggests that the matter was voted on but never discussed; and there is no information from Colegio to indicate what was actually disclosed to the members about the nature of the suit, the interests of the members in the suit, or the basis for opposing a law suit aiming to recover damages for the members. Nor do Colegio's earlier tactics inspire confidence in the resolution.

Colegio's final attack on the class certification is that the plaintiffs failed to provide notice of the law suit as is

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5. The wording of the resolution is as follows:

> Be it resolved by the special general membership meeting of the [Colegio de Abogados de Puerto Rico ("CAPR")]: ... Second: Reject the class action suit presented at the U.S. District Court for the District of Puerto Rico by attorneys Herbert Brown III, Jose L. Ubarri, and David Roman, on their own right and representing all members of the CAPR, as it does not represent the individual or collective sentiments of the General Meeting's membership.

required by Rule 23(c)(2). For the declaratory relief class (certified under Rule 23(b)(2)), the court "may" notify the class; but for the damages class (certified under Rule 23(b)(3)), the court "must direct to class members the best notice that is practicable under the circumstances." Fed.R.Civ.P. 23(c)(2)(A),(B). What Colegio objects to here is the failure to give notice to the latter class.

The notice to those in the damage class must include, as stated in the rule, the right of the class member to seek to appear by his or her own attorney or to opt out of the class and-if he or she fails to opt out-a warning that he or she will be bound by the judgment. Fed.R.Civ.P. 23(c)(2)(B). Although the rule does not say when notice must be given, "[t]he purpose of Rule 23(c)(2) is to ensure that the plaintiff class receives notice of the action well before the merits of the case are adjudicated." *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir.1995), *cert. denied*, 517 U.S. 1121, 116 S.Ct. 1355, 134 L.Ed.2d 523 (1996); *see* Wright, Miller & Kane, *7AA Federal Practice & Procedure* § 1788 (3d ed.2005).

As the district court awarded the damages class seemingly the best relief imaginable (reimbursement of the entirety of their premiums paid during the class period), few members of the class may now have any incentive to opt out; but some may prefer as a matter of principle to support Colegio rather than win a judgment against it. Anyway, the notice requirement for 23(b)(3) class actions is rooted in due process and clearly mandatory under Rule 23(c)(2)(B), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S.Ct. 2140, 40 L.Ed.2d

732 (1974); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 548-49, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), so on remand the district court must provide the notice, which ought to be done promptly.

Colegio's final arguments take issue with the district court's award, on summary judgment, of roughly $4 million in money damages representing the charges Colegio collected for the insurance from 2002 to the end of the program. The standard of review varies with the issue.[6] There is also a procedural quirk-relating to the adequacy of notice to Colegio that damages were to be determined without full-scale litigation-which provides necessary context for certain of our rulings.

The plaintiffs' original complaint requested only declaratory and injunctive relief; their motion for summary judgment was then filed; and their damage claim was then added by amendment. But the original complaint and summary judgment motion did seek a declaration that plaintiffs' rights had been violated-a predicate for damages. And, by the time Colegio filed its opposition to summary judgment, the amendment to the complaint had been allowed.

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6. A damage award by the district judge may involve questions of law reviewed *de novo* but is otherwise reviewed for abuse of discretion. *Lawton v. Nyman*, 327 F.3d 30, 37 (1st Cir.2003). That damages were awarded on summary judgment adds the further requirement that the district court not resolve fairly disputable factual issues against the non-moving party. *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 43 n. 1, 50-51 (1st Cir.1999).

Appendix A

The opposition to summary judgment, filed over 22 months after the motion for summary judgment itself, asserted (correctly) that the request for damages was not part of the summary judgment motion; but it noted Colegio's position that the non-objecting class of plaintiffs had gotten the benefit of their payments. The opposition offered *no* objection to non-mutual offensive collateral estoppel-which had been expressly sought in the summary judgment motion-nor did it mention the statute of limitations or any concern about vicarious liability.

In September 2008, the district judge in granting summary judgment concluded that the plaintiffs were also entitled to damages and ordered the plaintiffs to identify, subject to objection by Colegio, "the monetary amount of membership dues that was allocated to the compulsory life insurance program between the entry of judgment in the Romero litigation in 2002 and the present," as well as costs and attorneys' fees. Eventually, the figure ($4,156,988.70) was elicited from Colegio, and, in April 2009, the district court entered a final judgment in that amount, reserving attorneys' fees for later disposition.

On this appeal, Colegio now argues that the damage award is improper for a succession of reasons: that notice and discovery as to damages should have been allowed, that the plaintiff class members had benefitted from the insurance and so deserved *no* damages, that non-mutual offensive collateral estoppel was improper, that some of the damage claims are barred by the statute of limitations, and that liability is being imposed on Colegio

vicariously and inconsistent with precedent. It also makes an undeveloped evidentiary objection of which nothing more need be said.

When the district judge proposed that Colegio return the premiums it had charged after Romero held mandatory insurance unlawful, Colegio had ample opportunity to state its objections and explain what discovery or other proceedings it needed. Instead, in the course of a number of filings made after the district court's request for data as to the premiums, Colegio's contention was simply that it owed nothing because the class members had not objected to paying for insurance and had benefitted from coverage.

Thus, three of the objections now pressed by Colegio are forfeit. The objection to collateral estoppel, *see Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329-31, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (disfavoring certain applications), ought initially to have been made in opposition to summary judgment; and Colegio had over the many months between the finding of liability and the final damages determination an obligation to make clear its statute of limitations and vicarious liability objections. Although both were mentioned summarily in Colegio's original answer, no effort to assert or explain these objections occurred thereafter and attempts to do so on appeal come too late. *McCoy,* 950 F.2d at 22.[7]

7. The vicarious liability objection, at least as briefed by Colegio, is hopeless; Colegio is responsible under 42 U.S.C. § 1983 for the authorized action of its board and officers in

(Cont'd)

One argument remains. Colegio has consistently argued, starting with its opposition to summary judgment, that the class is composed of non-objecting parties who got the benefit of the insurance protection and that therefore no damages should be awarded. This assumes, perhaps mistakenly, that the premium charged by Colegio was no more than the fair market value of the insurance; but a further assumption, even more clearly flawed, is that the insurance was in fact desired by the class members on whom it was inflicted.

Perhaps some members of the class wanted the insurance, were even willing to have part of their payment go to Colegio rather than the insurer, and would have purchased it even if a box on the dues notice made the purchase optional. But we know from prior protests that some lawyers did not want the insurance: some class members may have been unaware of the *Romero* decision; others may have accepted Colegio's remarkable claim that only Romero himself could benefit from the decision; and still others may have learned enough of how Colegio treated objectors (*see* note 1, above) to stay silent because of the threatening obstruction and penalties.

(Cont'd)
maintaining the insurance program. *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Whether it might have cut back on damages on statute of limitations grounds is a closer question, given the otherwise applicable one year statute. *See Rivera-Ramos v. Roman*, 156 F.3d 276, 282 (1st Cir.1998).

Starting with those members who did not want the insurance, we reject Colegio's claim that those class members cannot recover their premiums because they "benefitted" from coverage that they did not desire. The ordinary rule in tort law is that damages are not reduced by conferring undesired benefits of some other species. *Restatement (Second) of Torts*, § 920 & cmt. f (1979); 1 D. Dobbs, *Law of Remedies*, § 3.8(2), at 378 (2d ed.1993). There are exceptions but only where the equities favor the wrongdoer, *Restatement, supra*, cmt. f.

An example of an equitable exception is *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 453-55, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). There the Supreme Court declined to decide whether non-union members could be forced to pay dues-required of them because the union represented them in bargaining-that included the cost of very modest death benefits available to members and non-members alike. But in holding that the union's decertification mooted the issue for the future, the Court said, "We doubt that the equities call for a refund of those payments." *Id.* at 455.

The question whether the death benefits charge was improper under the relevant labor statute was plainly close-the benefits were somewhere between union activities for which non-members could be charged and those for which they could not; in fact, the circuit court had held that such benefits fell in the former class. *Id.* at 454. The union's good faith was surely a relevant equity. Here, where Colegio collected all of the premiums

in question in the teeth of *Romero*, we have no doubt that the equities weigh very much against the defendant and warrant no exception to the ordinary tort rule.

This leaves those members who did want the insurance from Colegio or, conceivably, those who wanted it instead from some other entity but accepted the Colegio-imposed insurance as a substitute and curtailed other insurance. But Colegio has suggested no *practical* means to distinguish those groups from other members of the class. Even if endless mini-trials were conducted at great expense, every member would be free in light of Colegio's conduct to claim that-even had he heard of *Romero*-he was an unwilling purchaser.

Although in class actions there is a preference for individually proven damages, *cf. Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984), it is well accepted that in some cases an approximation of damages or a uniform figure for the class is the best that can be done.[8] This is an unusually suitable case for the district judge's blanket

8. *See, e.g., McClain v. Lufkin Indus.*, 519 F.3d 264 (5th Cir.), *cert. denied*, — U.S. ——, 129 S.Ct. 198, 172 L.Ed.2d 141 (2008) (allowing class-wide formula rather than individual hearings to determine back pay); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073 (4th Cir.1977) (dividing damages equally among all class members who might have been qualified for a job); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir.1976), *cert. denied*, 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977) (averaged classwide relief is preferable to no relief); *Barr v. WUI/TAS, Inc.*, No. 74 Civ. 2687-LFM, 1976 WL 1205 (S.D.N.Y.1976) (distributing equally among class members because there was no method to determine the amount that any particular subscriber was overcharged by the defendant).

remedy: from *Romero* onward, Colegio knowingly inflicted all of the insurance on willing and unwilling members alike in the teeth of a ruling that it was not entitled to do so; and it has offered no practical solution to the problem apart from paying nothing at all.

There is one caveat. We have already ruled that class members are entitled on remand to opt out of the class and be excluded from the judgment. If Colegio is right about the degree of its support among the membership, this opt-out group may well include most or all those who were happy to have the insurance at the price charged, thereby significantly reducing the ultimate judgment. To the extent of such opt-outs, Colegio is entitled to a proportionate reduction of the damage award.

We *affirm* the district court's declaration of liability and its grant of injunctive relief but *vacate* its judgment insofar as it determines the amount of damages, and *remand* to allow notice to be given to class members including their right to opt out of the class. Following the expiration of the notice period, the district court may reinstate a damage award calculated as before but this time excluding damages otherwise attributable to those who have opted out of the class.

It is so ordered.

C.A.1 (Puerto Rico), 2010.
Brown v. Colegio de Abogados de Puerto Rico
613 F.3d 44

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED FEBRUARY 3, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 06-1645 (JP)

HERBERT W. BROWN III, et al.,

Plaintiffs

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

Defendant

OPINION AND ORDER

Before the Court is Plaintiffs' motion to alter or amend judgment **(No. 85)**, Defendant's opposition thereto (No. 89), and Plaintiffs' reply brief (No. 94). Also before the Court is Plaintiffs' motion requesting Order directing Defendant to produce information on insurance **(No. 86)**. For the reasons stated herein, Plaintiffs' motion to amend judgment is hereby **GRANTED IN PART AND DENIED IN PART**, and Plaintiffs' motion directing Defendant to produce insurance information is hereby **GRANTED.**

Appendix B

I. INTRODUCTION AND BACKGROUND

Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 ("Section 1983") for violations of their rights under the First, Fifth, and Fourteenth Amendments of United States Constitution. Plaintiffs alleged that the Colegio de Abogados (the "Colegio"), an integrated bar association in Puerto Rico, used approximately forty percent of each attorney's annual dues to purchase a compulsory life insurance policy. Plaintiffs argued that this expenditure was not germane to the purposes justifying an integrated bar association and was therefore unconstitutional.

On September 26, 2008, the Court granted Plaintiffs' motion for summary judgment, holding that Defendant was barred by the doctrine of non-mutual collateral estoppel from re-litigating the unconstitutionality of its compulsory life insurance plan (No. 80). The Court held that Plaintiffs were entitled to: (1) a permanent injunction forbidding the Colegio from collecting that portion of its members' future annual dues attributable to the compulsory life insurance program, and (2) the amount of total dues allocated toward the compulsory life insurance program from October 9, 2002 to the present, plus interest, costs and attorneys' fees. The Court ordered Plaintiffs to file a motion detailing the money amount of membership dues that was allocated to the compulsory life insurance program between 2002 and the present, along with a motion detailing Plaintiffs' attorneys fees and costs. On October 7, 2008, the Colegio filed a notice of appeal.

Plaintiffs filed their motion to amend the judgment on October 10, 2008.

II. LEGAL STANDARD FOR A MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, within ten days of the entry of judgment, a party may move the Court "to amend its judgment based on newly discovered material evidence or because the Court committed a manifest error of law or fact." *Rodriguez-Narvaez v. Pereira*, 552 F. Supp. 2d 211, 221 (D.P.R. 2007) (internal quotations omitted). Rule 59(e), however, is aimed at reconsideration, and therefore is not a proper mechanism for a party to advance arguments that should have been presented to the court before judgment was entered, but were not. *Id.* Likewise, Rule 59(e) motions are not an appropriate method to "repeat old arguments previously considered and rejected." *National Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990). As such, Rule 59(e) motions are "extraordinary remedies which should be used sparingly . . . and are typically denied." *Silva Rivera v. State Ins. Fund Corp.*, 488 F. Supp. 2d 72, 78 (D.P.R. 2007) (internal citations omitted).

III. ANALYSIS

Plaintiffs move to amend the Final Judgment to reflect the full amount of damages stemming from the Colegio's pattern of allocating dues for compulsory life

insurance, and also to award punitive damages to Plaintiffs. Plaintiffs have informed the Court that the Colegio has "obstinately refused" to stipulate the amount of money used for the compulsory insurance fund. Further, Plaintiffs argue that the Colegio has set up a "montepio," a compulsory life insurance program run by the Colegio, that continues to collect the unconstitutional premiums for life insurance in spite of the Court's decision. To that end, Plaintiffs move the Court to certify a third class of Plaintiffs whose dues have been allocated toward the montepio. In opposition, the Colegio argues that the Court lacks jurisdiction over Plaintiffs' motion. The Court will begin with the threshold jurisdictional question, and then consider Plaintiffs' arguments in turn.

A. Jurisdiction

Defendant argues that the Court lacks jurisdiction over Plaintiffs' motion to amend the judgment because an appeal was timely filed, thereby conferring jurisdiction to the United States Court of Appeals for the First Circuit. In response, Plaintiffs argue that Defendant has prematurely appealed the Court's decision, given that the monetary award has not been defined.

Once a notice of appeal is filed, the district court loses jurisdiction and the case moves up the appellate ladder. *Laboy v. Panisse*, 213 F. Supp. 2d 54, 60 (D.P.R. 2002) (Pieras, J.). However, the filing of a notice of appeal divests a district court of jurisdiction over only those

aspects of the case involved in the appeal. *Mendez-Matos v. Municipality of Guaynabo*, 498 F. Supp. 2d 473, 475 (D.P.R. 2007) (Pieras, J.) (holding that matters relating to attorneys' fees were not among the issues the parties were appealing, and therefore were within the trial Court's jurisdiction); *See also Hovey v. McDonald*, 109 U.S. 150, 157 (1883). A qualification of this general rule is that a district court may perfect its judgment, for example by completing the record or correcting an obvious mistake. *Hovey*, 109 U.S. at 157. The United States Supreme Court has held that after appeal, the trial court may, if the purposes of justice require, preserve the status quo until the appellate court renders its decision. However, the trial court may not finally adjudicate substantial rights directly involved in the appeal. *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922) (internal citations omitted).

Pursuant to Rule 4(A)(v) of the Federal Rules of Appellate Procedure, when a party timely files a motion to amend the judgment under Rule 59 of the Federal Rules of Civil Procedure, the time to file an appeal runs from the entry of the order disposing of the Rule 59 motion. Fed. R. App. Pro. 4(A)(v). When a party files a notice of appeal after the Court announces or enters a judgment, but before it disposes of the Rule 59 motion, the notice of appeal becomes effective when the order disposing of the Rule 59 motion is entered. Fed. R. App. Pro. 4(a)(4)(B)(i); *see Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 67 (1st Cir. 2005). In the case at bar, Plaintiffs' motion to alter the Final Judgment was timely filed on October 10, 2008, within the ten day

period prescribed by Rule 59 of the Federal Rules of Civil Procedure.

On January 21, 2009, the First Circuit issued an Order stating that it would not consider Defendant's premature appeal until this Court resolved the pending post-judgment motion. Therefore, it is clear that this Court has jurisdiction to resolve the issues presented in Plaintiffs' motion to amend the Final Judgment before Defendants' notice of appeal takes effect.

B. Quantification of Damages

In communications between the parties following the entry of the Final Judgment, the Colegio informed Plaintiffs that the amount of four million seventy-three thousand sixty dollars and fifty five cents ($4,073,060.55) reflects the correct amount of the life insurance premiums paid for the period from October 9, 2002, until the discontinuation of the mandatory life insurance program by the Colegio on December 31, 2006. Despite making this representation, Defendant refuses to stipulate that this number is correct. The Colegio has informed the Court that it cannot stipulate to this amount because it includes the premiums paid and earned in all the cases of members who died and the beneficiaries collected, as well as the premiums paid and earned in all the cases of members who would have and will opt out of this lawsuit in accordance with Rule 23 of the Federal Rules of Civil Procedure.

The Court holds that a quantification of damages, based on the Colegio's membership dues allocated to insurance premiums between 2002 and 2006, is necessary for perfection of the Final Judgment. Plaintiffs have moved the Court for an order requiring Defendant to stipulate to said amount of damages (No. 86). The Court **GRANTS** said motion, and requires Defendant to file a motion specifying the amount of funds allocated for the insurance premiums as follows:

> (1) **On or before February 16, 2009,** Defendant **SHALL** provide the Court with an accounting for the disbursements made to the insurance company for the life insurance premiums during the period between 2002 and the present;
>
> (2) **On or before March 2, 2009,** Defendant **SHALL** provide the Court with any further information necessary to determine the total amount of funds allocated to the compulsory life insurance program during the time period at issue.

Upon receipt of this information, the Court will amend the Final Judgment to reflect the monetary amount of damages imposed.

c. Punitive Damages

Plaintiffs also move the Court to amend the Final Judgment to include an award of punitive damages. The

Court notes that Plaintiffs did not specifically request punitive damages in their motion for summary judgment. Plaintiffs argue that punitive damages should be awarded based on Defendant's pattern of conduct, which includes refusing to refund the money allocated for the unconstitutional premiums, and instituting a scheme to continue to allocate money for such use after the Final Judgment was entered on Plaintiffs' behalf.

The First Circuit has held that punitive damages should only be awarded pursuant to Section 1983 when a defendant has acted in a reckless manner, with callous indifference to the federally protected rights of others, or evil intent. *See Powell v. Alexander*, 391 F.3d 1, 15 (1st Cir. 2004) (citations omitted). Punitive damages are "not favored in the law and are allowed only with caution and within normal limits." *Id.* (quoting *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 508 (1st Cir. 1996)).

The Court finds that Plaintiffs have failed to demonstrate that Defendant's actions reach the standard of recklessness or evil intent required for the imposition of punitive damages. Accordingly, the Court denies Plaintiffs' motion on this issue.

D. Creation of a Third Plaintiff Class

Plaintiffs allege that the Colegio has allocated a portion of its members' dues since 2006 for the creation of a montepio, a Colegio-run compulsory life insurance program, despite the Colegio's representation to the Court and to its members that it has eliminated the

compulsory life insurance program. As such, Plaintiffs request the creation of a new Plaintiff class, comprised of:

> All attorneys practicing in the Commonwealth of Puerto Rico local courts from 2007 onwards who were obligated to pay the Colegio de Abogados their yearly annual membership renewal fee in order to practice law in this jurisdiction.

The Court declines to rule on this issue until the damages amount for the Final Judgment (No. 81) has been established. As such, the Court **HOLDS IN ABEYANCE** Plaintiffs' motion to create a third Plaintiff class.

IV. CONCLUSION

As such, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' motion to amend the Final Judgment.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 3rd day of February, 2009.

/s/_____
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED SEPTEMBER 25, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 06-1645 (JP)

HERBERT W. BROWN III, et al.,

Plaintiffs

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

Defendant

OPINION AND ORDER

Before the Court is Plaintiffs Herbert W. Brown, III, Jose L. Ubarri, and David W. Roman's (collectively, "Plaintiffs") motion for summary judgment (Nos. 13 and 14) and Defendant Colegio de Abogado's (the "Colegio") opposition thereto (No. 70), as well as Plaintiffs' reply brief (No. 73). Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 ("Section 1983") for violations of their rights under the First, Fifth, and Fourteenth Amendments of United States Constitution. Plaintiffs allege that the Colegio, an integrated bar association[1]

1. An "integrated bar" association is a bar association in which membership is statutorily required of attorneys in order to practice law in a particular jurisdiction. *See* Black's Law Dictionary 158 (8th ed. 2004).

in Puerto Rico, used approximately forty percent of each attorney's annual dues to purchase a compulsory life insurance policy. Plaintiffs argue that this expenditure was not germane to the purposes justifying an integrated bar association. Plaintiffs now move the Court for summary judgment, arguing that the Colegio is barred by the doctrine of non-mutual collateral estoppel from re-litigating the constitutionality of its compulsory life insurance policy since an earlier decision by this Court found the policy to be unconstitutional. For the reasons stated herein, Plaintiffs' motion for summary judgment (**Nos. 13 and 14**) is hereby **GRANTED.**

I. MATERIAL FACTS NOT IN GENUINE ISSUE OR DISPUTE

The following facts are deemed uncontested by the Court because they were included in the motion for summary judgment and opposition and were agreed upon, or they were properly supported by evidence and not genuinely opposed.[2]

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2. Rule 56 of the Local Rules of the United States District Court for the District of Puerto Rico requires an opposition to a motion for summary judgment to be accompanied by an opposing statement of material facts which admit, deny, or qualify the facts provided by the moving party. Failure to do so results in the admission of the properly-supported facts submitted by the moving party. The Colegio has not complied with Local Rule 56. As such, Plaintiffs' properly-supported proposed uncontested facts shall be deemed admitted.

Appendix C

1. Since the Colegio is an integrated bar association, all members of the plaintiff class are required to be members of the Colegio as a precondition to practicing law in the Commonwealth of Puerto Rico.

2. Member of the Colegio are required to pay annual dues in the amount of $ 200.00.

3. A portion of the annual dues charged by the Colegio is used to pay for a compulsory life insurance plan.

4. For the year 2006, the compulsory life insurance plan cost each attorney $78.00 of his or her $200.00 annual dues - almost forty percent of the total dues.

5. In 1994, Carlos A. Romero, Jr. ("Romero") brought suit in the United States District Court for the District of Puerto Rico asserting, *inter alia,* that the Colegio's mandatory life insurance program is not germane to the purposes that justify an integrated bar association.

6. On February 25, 1999, the United States District Court for the District of Puerto Rico granted summary judgment in the Colegio's favor.

7. Romero appealed the grant of summary judgment to the United States Court of Appeals for the First Circuit, and the First Circuit reversed and remanded the case back to the District Court, with instructions to certify a question to the Puerto Rico Supreme Court.

8. On remand from the United States Court of Appeals for the First Circuit, the District Court certified the following question to the Puerto Rico Supreme Court: "Is the Colegio de Abogados de Puerto Rico authorized to compel members to purchase life insurance coverage through the Colegio as a condition of membership in the bar of Puerto Rico?"

9. The Supreme Court of Puerto Rico answered the certified question in the affirmative, stating that the Colegio is authorized, pursuant to Puerto Rico law, to compel its members to pay for life insurance from their annual dues.

10. The Supreme Court of Puerto Rico, however, did not address Romero's arguments pursuant to the United States Constitution regarding the Colegio's mandatory life insurance plan.

11. On October 9, 2002, after eight years of litigation, the United States District Court (J. Saris, sitting by designation), issued a Memorandum and Order concluding that ". . . the mandatory life insurance plan is not germane [to the purposes of the Colegio], and that Romero may not be forced to pay for it through his membership dues."

12. The District Court granted Romero a permanent injunction against the Colegio prohibiting the Colegio from collecting "that portion of [Romero's] annual dues attributable to the Colegio's mandatory group life insurance program."

13. The District Court also awarded Romero damages as a result of the Colegio's unconstitutional taking of his money to pay for the compulsory life insurance policy, as well as interest and attorneys' fees.

14. The Colegio sought to appeal the District Court's judgment, but later voluntarily dismissed the appeal before it reached the briefing stage.

15. The Colegio was aware of the District Court's October 9, 2002, Memorandum and Order and ensuing Judgment in the

Romero case upon notification, since it was a party to that litigation.

16. The Colegio did not specifically notify its membership of the District Court's ruling and of the unconstitutionality of its compulsory life insurance program, however the decision was mentioned in the Treasurer's Report for the years 2003 and 2004.

17. On November 30, 2005, a group of five attorneys wrote a letter to the Colegio, through its President Julio Fontanet, Esq., directing the Colegio to stop charging them that portion of their annual dues attributable to the mandatory life insurance program.

18. On February 2, 2006, the Colegio sent a letter in response stating that it would return to each of the five attorneys the $78.00 used for the purchase of compulsory life insurance, under three "conditions":

    (a) The authorization was for the current year (2006), because the Colegio's Board supposedly could not bind the new Board that would take office in September 2006. As a result, the

Colegio stated, the attorneys would be forced to make additional requests come dues-paying time for the 2007 fiscal year and every year thereafter;

(b) The Colegio's action supposedly could not be deemed as a precedent for future cases;

(c) The premium for the compulsory life insurance in 2006 was $78.00, and could change the following year.

19. On February 23, 2006, the group of five attorneys wrote the Colegio and rejected each and every one of the preconditions that the Colegio wished to impose upon them before it returned to each of them the $78.00 used for the purchase of compulsory life insurance.

20. On February 27, 2006, a second group of eight attorneys wrote a letter to the Colegio requesting the return of the portion of their dues attributable to the purchase of compulsory life insurance, and directing the Colegio to stop charging them that portion based on the Romero decision.

21. On March 3, 2006, the Colegio sent out letters to the attorneys in the first group of five attorneys, along with individual checks for $78.00 each.

22. The group of eight attorneys were reimbursed with the unearned premium of their coverage in the life insurance program for the year 2006 after the matter was submitted by the Colegio to the Review Board.

23. On April 20, 2006, the Colegio wrote a letter to the group of eight attorneys, informing them that it had filed a petition before a state-based "Review Board," which named the attorneys that composed the group of eight (along with six others) in the caption. As to these attorneys, the Colegio asked the Review Board to advise whether the Colegio, instead of returning the compulsory insurance premium, could provide the attorneys with vouchers to be used in Colegio seminars, to purchase Colegio-issued books or materials, or to enroll the attorneys in the Colegio's optional health or disability insurance plans.

24. Membership dues for attorneys who are seventy-five years or older and have been admitted to practice law in Puerto Rico

for twenty-five years or more are reduced by fifty percent.

25. Dues for the Colegio's members must be paid by January 31 of each year.

26. Plaintiffs never filed an objection before the Colegio regarding their participation in the life insurance program nor did they ask to be reimbursed with the portion of their annual membership dues destined to fund their coverage in the life insurance program.

27. On October 14, 2006, the Colegio's new Governing Board ratified the agreement taken by the previous Board to cancel the life insurance program paid with a portion of the annual membership dues starting from December 31, 2006.

28. Since the discontinuance of the life insurance program offered by the Colegio in 2006, no portion of the annual membership dues paid by its members has been used to pay for such a program.

II. LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Summary judgment serves to assess the proof to determine if there is a genuine need for trial. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when "the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, viewed in the light most favorable to the nonmoving party, reveals no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Zambrana-Marrero v. Suarez-Cruz*, 172 F.3d 122, 125 (1st Cir. 1999) (stating that summary judgment is appropriate when, after evaluating the record in the light most favorable to the non-moving party, the evidence "fails to yield a trial worthy issue as to some material fact"); *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993); *Canal Ins. Co. v. Benner*, 980 F.2d 23, 25 (1st Cir. 1992). The Supreme Court has stated that "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In this way, a fact is material if, based on the substantive law at issue, it might affect the outcome of the case. *See Mack v. Great Atl. and Pac. Tea Co., Inc.*, 871 F.2d 179, 181 (1st Cir. 1989).

On a summary judgment motion, the movant bears the burden of "informing the district court of the basis for its motion and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2253, 91 L. Ed. 2d 265 (1986). Once the movant meets this burden, the burden shifts to the opposing party who may not rest upon mere allegations or denials of the pleadings, but must affirmatively show, through the filing of supporting affidavits or otherwise, that there is a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553; *Goldman*, 985 F.2d at 1116.

III. ANALYSIS

Plaintiffs move for summary judgment, arguing that the doctrine of non-mutual collateral estoppel bars the Colegio from re-litigating the constitutionality of its compulsory life insurance program after the Romero decision was entered. The Court will now consider Plaintiffs' arguments.

A. Non-Mutual Offensive Collateral Estoppel

When a plaintiff implores a federal court to give preclusive effect to a prior federal court adjudication, federal law governs. *Faigin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999). The doctrine of collateral estoppel bars re-litigation of any factual or legal issue that was actually decided in previous litigation "between the parties,

whether on the same or a different claim." *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994), quoting Restatement (Second) of Judgments, § 27 (1982). "An issue may be 'actually' decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached." *Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 899 (1st Cir. 1984). It is well-established that the reach of collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding." *IRS v. Sunnen*, 333 U.S. 591, 599-600, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

The United States Court of Appeals for the First Circuit has held that a party seeking to estop the litigation of an issue by reference to a previous adjudication between the parties must establish: (1) an identity of issues, (2) actuality of litigation, (3) finality of the earlier resolution, and (4) the centrality of the adjudication (meaning that the determination of the issue in the prior proceeding was essential to the final judgment or order). *Faigin*, 184 F.3d at 78. The Court must examine now Plaintiffs' arguments in light of these required elements.

1. Mutuality of Parties

Before determining whether Plaintiffs have established the aforesaid criteria for the application of offensive collateral estoppel, the Court must consider the threshold issue of whether collateral estoppel may

apply in an instance where the second lawsuit involves different plaintiffs from the prior adjudication. Originally, the scope of collateral estoppel was limited by the doctrine of mutuality of parties. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-327, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). The United States Supreme Court stated that collateral estoppel has the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing unnecessary litigation. *See Blonder-Tongue Lab, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971). Under the rationale that it was unfair to allow a party to use a prior judgment when he himself would not be so bound, the mutuality requirement gave a litigant who had lost in a previous lawsuit the opportunity to re-litigate identical issues with new parties. *Parklane Hosiery Co.*, 439 U.S. at 326-327.

However, in *NLRB v. Donna-Lee Sportswear Co.*, the First Circuit noted that the United States Supreme Court has endorsed a trend in the law allowing, in certain circumstances, collateral estoppel to be asserted by parties who were not present in the initial lawsuit. 836 F.2d 31, 35, n.4 (1st Cir. 1987), *citing Parklane Hosiery Co.*, 439 U.S. at 322 (holding that a defendant in stockholders' class action suit was precluded from re-litigating issues decided against it in an earlier action brought by the United States Securities and Exchange Commission); *Blonder-Tongue Lab, Inc.*, 402 U.S. at 313 (holding that the invalidity of patent determined in prior

lawsuit may preclude assertion of patent validity in later infringement suit brought against a different defendant). In these two cases, the United States Supreme Court abandoned the mutuality requirement in recognition of the obvious difference in position between a party who has never litigated an issue and one who has fully litigated an issue and lost. *See Parklane Hosiery Co.*, 439 U.S. at 327.

The Supreme Court decided that the best approach for dealing with the issue of offensive collateral estoppel in federal courts is to grant trial courts broad discretion to determine when the doctrine should be applied. *Parklane Hosiery Co.*, 439 U.S. at 331. The general rule is that district courts should not permit offensive collateral estoppel in cases where a plaintiff could easily have joined in the earlier action, or where the application of offensive estoppel would be unfair to a defendant. *Id.*

Here, Carlos Romero was the plaintiff in the prior adjudication, and the current Plaintiffs were not named parties in the earlier litigation. It is not clear whether Plaintiffs could have joined in the earlier suit, as the date of the commencement of their membership in the Colegio has not been conclusively established. If Plaintiffs were not members of the Colegio at the time the Romero action was filed, they could not have joined as plaintiffs to the first lawsuit.

The Court is not aware of any reason why applying non-mutual offensive collateral estoppel to the instant action would not be fair to the Colegio. Specifically, the

Colegio had every incentive to vigorously defend the first litigation, given that future suits by other members could have been foreseeable. *See Parklane Hosiery Co.*, 439 U.S. at 330. The judgment relied upon by Plaintiffs is not inconsistent with any previous judgments in favor of the Colegio. *See id.* Finally, the instant litigation does not afford the Colegio procedural opportunities that were unavailable in the first action that could readily cause a different result. *See id.* As such, the Court exercises its discretion to determine that non-mutual offensive collateral estoppel may be applied in this case. The Court must now determine whether Plaintiffs have met their burden of establishing the four criteria required by *Faigin, supra.* 184 F.3d at 78.

2. Identity of Issues

The first element that Plaintiffs must prove in order to prevail on their summary judgment motion is that the issues adjudicated in the Romero litigation are the same as those at issue in the instant action. *See Faigin*, 184 F.3d at 78. The Court agrees with Plaintiffs that the issue at stake here — the unconstitutionality of the Colegio's compulsory life insurance program — is identical to the central issue at stake in the Romero litigation. In the earlier litigation, Romero, a member of the Colegio, argued that the compulsory life insurance program was not germane to the purposes that justify the Colegio, an integrated bar association, and thus violated his First Amendment rights. Plaintiffs in the instant action are also members of the Colegio who have been required to pay a portion of their dues

toward a mandatory life insurance policy. Despite the outcome of Romero, the Colegio continued to allocate a portion of the members' dues toward a life insurance program. Because the same allocation of bar association dues toward mandatory life insurance is at stake in both lawsuits, the Court holds that Plaintiffs have met the identity of issues requirement.

3. Actuality of Litigation

The second element requires Plaintiffs to demonstrate that the issue at stake in the instant litigation was actually litigated in the earlier proceeding. *See Faigin*, 184 F.3d at 78. As stated above, the central issue in both lawsuits is the constitutionality of the compulsory life insurance program for members of the Colegio.

The Court finds that this exact issue was extensively briefed and litigated before this Court, and again before the First Circuit, where an oral argument was held on this issue. The First Circuit held that the non-ideological activities of an integrated bar association were subject to the First Amendment's germaneness requirement. *Romero, Jr.*, 204 F.3d at 296-303. On remand, this Court certified the following question to the Puerto Rico Supreme Court: "Is [the Colegio] authorized to compel members to purchase life insurance coverage through the Colegio as a condition of membership in the bar of Puerto Rico?" *Romero, Jr. v. Colegio de Abogados de Puerto Rico*, Civ. No. 94-2503 (PBS), No. 71. In response, the Puerto Rico Supreme Court stated that, under

Puerto Rico law, the Colegio was authorized to compel its members to pay for life insurance from their annual dues. *See Carlos Romero, hijo v. Colegio de Abogados de Puerto Rico*, 2001 TSPR 86, 154 P.R. Dec. 370, 2001 J.T.S. 89 (P.R. June 12, 2001). Back before this Court, Plaintiff Romero moved for summary judgment, which was briefed and orally argued by both parties. *Romero, Jr.*, Civ. No. 94-2503 (PBS), Nos. 93, 98, and 109. The Court then ruled that the Colegio's mandatory life insurance program was not germane to the purposes justifying an integrated bar association, and therefore the program violated Plaintiff Romero's constitutional rights. *Id.* at No. 113. The Colegio initiated an appeal of the Court's decision, but later voluntarily dismissed its appeal, thereby rendering this Court's decision as final. As such, there is no question that the issue of the constitutionality of the mandatory life insurance program was actually litigated in the earlier lawsuit.

4. Finality of the Earlier Adjudication

The third element for collateral estoppel requires Plaintiffs to demonstrate that the issue was determined by a valid and binding final judgment or order. *See Faigin*, 184 F.3d at 78. As stated above, the issue of the constitutionality of the Colegio's compulsory life insurance program was considered by this Court, the Puerto Rico Supreme Court, and the First Circuit. After eight years of active litigation, the Colegio abandoned its appeal, thereby rendering this Court's summary judgment decision in favor of Plaintiff Romero as the final and binding judgment. Thus, Plaintiffs clearly meet

the finality element required for the application of non-mutual offensive collateral estoppel.

5. Centrality of the Adjudication

Finally, the Court must consider whether the determination of the issue in the prior proceeding was essential to the final judgment. *See Faigin*, 184 F.3d at 78. To reach its decision on the constitutionality of the compulsory life insurance program, the Court determined that the program was not germane to the purposes of an integrated bar association. Accordingly, because this Court found that the Colegio had violated Plaintiff Romero's constitutional rights as a result of the compulsory life insurance program, the Court ordered the Colegio to refund the portion of Plaintiff Romero's dues that has been used to purchase the mandatory life insurance since 1993. Therefore, the Court's decision regarding the germaneness of the life insurance program and the consequent violation of Plaintiff Romero's rights was essential to the remedy that was mandated. The Court therefore holds that Plaintiffs met the fourth and final requirement of the test set forth by *Faigin, supra*.

The Court thus finds that the Colegio "received a full and fair opportunity to litigate their claims" in the first litigation. *See Acevedo-Garcia v. Monroig*, 351 F.3d 547, 575 (1st Cir. 2003), citing *Parklane Hosiery*, 439 U.S. at 332. Plaintiffs have demonstrated that no genuine issue of material fact exists as to whether the doctrine of non-mutual offensive collateral estoppel

applies to this action. The entry of summary judgment in Plaintiffs' favor is thereby warranted.

B. Remedies

Having granted Plaintiffs' motion for summary judgment, the Court will briefly address the Colegio's opposition[3] to two of the remedies sought by Plaintiffs: declaratory judgment and permanent injunctive relief.[4]

1. Declaratory Judgment

In their amended complaint and subsequent motion for summary judgment, Plaintiffs move the Court to enter a declaratory judgment stating that the Colegio's mandatory life insurance program is unconstitutional, as it is not germane to the purposes that justify an integrated bar association. Further, Plaintiffs seek a declaratory judgment preventing the Colegio from allocation a portion of its members' dues for the mandatory life insurance program. The Declaratory Judgment Act states, in pertinent part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may

3. The Court notes that the majority of the Colegio's brief is dedicated to arguing why these two remedies are not available to Plaintiffs, rather than addressing the merits of Plaintiffs' collateral estoppel argument.

4. Plaintiffs also request the return of the portion of the Colegio's members' dues that were allocated to the life insurance benefit since the entry of the Romero decision in 2002, as well as attorneys' fees and costs.

> declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. 28 U.S.C. § 2201 (1988).

The United States Supreme Court has held that declaratory relief is discretionary. *El Dia, Inc. v. Hernandez-Colon*, 963 F.2d 488, 493 (1st Cir. 1992), internal citations omitted. A district court must first determine that the constitutional prerequisites of jurisdiction and justiciability have been satisfied before considering the totality of the circumstances. *Id.* at 494. The First Circuit has held that when deciding whether to enter a declaratory judgment, courts must always consider "the need . . . to be chary about adjudicating constitutional rights by means of declaratory judgment actions. Uncertain questions of constitutional law should be addressed only when absolutely necessary." *Id.*

Here, the Court is satisfied that the threshold questions of jurisdiction and justiciability have been met. Although the Colegio argues that there is no actual case and controversy because the Colegio voluntarily discontinued the life insurance program, the Court disagrees. This issue was fully discussed in the Court's Opinion and Order on Defendant's motion to dismiss. *See* No. 62. In its opposition to Plaintiffs' motion for summary judgment, the Colegio has not set forth any further evidence that the life insurance program has

been permanently discontinued. In fact, Plaintiffs informed the Court (No. 76) that the Colegio has not reduced its members' fees to account for the elimination of the life insurance program. Rather, Plaintiffs informed the Court that the Colegio has instituted a trust in order to provide the same life insurance benefit that purportedly had been discontinued.

The constitutional question of whether the life insurance program was germane to the purposes of an integrated bar association was already thoroughly addressed in the earlier Romero litigation. Therefore, the Court is not concerned that the entry of a declaratory judgment will prematurely resolve a constitutional question before it can be completely adjudicated. See *El Dia*, 963 F.2d at 494. However, in light of the discussion of permanent injunctive relief below, the Court does not find it necessary to enter a declaratory judgment on Plaintiffs' behalf. The Court holds that the granting of permanent injunctive relief, along with the award of monetary damages, serves the purpose of fairly compensating Plaintiffs while preventing the Colegio from engaging in the unconstitutional practice of allocating its members' dues to a non-germane compulsory life insurance program.

2. Permanent Injunctive Relief

Plaintiffs also move the Court to permanently enjoin the Colegio from charging its members any amount for the purchase of life insurance from their annual dues. In order for a permanent injunction to be entered,

Appendix C

Plaintiffs must meet the following four requirements: (1) a showing of actual success on the merits; (2) that Plaintiffs would be irreparably injured in the absence of injunctive relief; (3) that the harm to Plaintiffs from the Colegio's conduct would exceed the harm to the Colegio accruing from the issuance of an injunction; and (4) that the public interest would not be adversely affected by an injunction. *Esso Std. Oil Co. (P.R.) v. Lopez-Freytes*, 467 F. Supp. 2d 156, 168 (D.P.R. 2006). It is well-established that the decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006).

The Colegio loosely argues that Plaintiffs do not meet the four requirements set forth above. The Court disagrees. Given that Plaintiffs have prevailed on the merits in their summary judgment motion, Plaintiffs have clearly established the first element. In the absence of injunctive relief, Plaintiffs may be further subjected to irreparable harm through an allocation of their membership dues toward a non-germane and therefore unconstitutional life insurance program. Given that the Colegio claims that the money allocated toward the life insurance program is for the benefit of its members only, the Colegio will not be harmed by the entry of a permanent injunction. Finally, the public interest will not be adversely affected by the entry of an injunction prohibiting the Colegio from collecting compulsory life insurance payments from Plaintiffs, who are members of the Colegio. In further support of the entry of a

permanent injunction in the instant action, the Court notes that a permanent injunction was entered by this Court on the same issue in the Romero litigation. Therefore, the Court finds that permanent injunctive relief is appropriate in this matter.

IV. CONCLUSION

In conclusion, the Court grants Plaintiffs' motion for summary judgment. In so doing, the Court holds that Plaintiffs are entitled to: (1) the entry of a permanent injunction, (2) damages to compensate the members of the Colegio whose dues were allocated to the compulsory life insurance program from the entry of the Romero decision in 2002 until the present, and (3) interest, attorneys' fees and costs. The Court will enter a separate judgment accordingly.

Further, it is hereby **ORDERED** that **on or before October 17, 2008,** Plaintiffs **SHALL** file an informative motion detailing the monetary amount of membership dues that was allocated to the compulsory life insurance program between the entry of judgment in the Romero litigation in 2002 and the present. **Also on or before October 17, 2008,** Plaintiffs **SHALL** file an informative motion detailing their costs and attorneys' fees. The Colegio **MAY** oppose these motions **on or before October 31, 2008;** said opposition **SHALL** contain the necessary financial documentation to support the Colegio's opposition.

IT IS SO ORDERED.

Appendix C

In San Juan, Puerto Rico, this 25th day of September, 2008.

/s/
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED SEPTEMBER 25, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 06-1645 (JP)

HERBERT W. BROWN III, et al.,

Plaintiffs

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

Defendant

FINAL JUDGMENT

For the reasons stated in its Opinion and Order entered this same date, the Court hereby **ENTERS JUDGMENT FOR PLAINTIFFS** to have and recover from Defendant Colegio de Abogados de Puerto Rico the amount of their annual dues allocated by Defendant toward the compulsory group life insurance program from October 9, 2002, until the present; plus interest, costs, and attorneys' fees.

This Court hereby, enters a permanent injunction as follows: Defendant Colegio de Abogados de Puerto Rico is hereby prohibited from collecting from its

members that portion of their future annual dues attributable to the Colegio's mandatory group life insurance program. Failure to comply with this Judgment will result in an immediate reimbursement of the funds allocated for compulsory group life insurance, or an Order of Execution against the property and assets of the Colegio.

IT IS SO ORDERED,

In San Juan, Puerto Rico, this 25th day of September, 2008.

/s/
JAIME PIERAS, JR.
U. S. SENIOR DISTRICT JUDGE

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED JULY 31, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 06-1645 (JP)

HERBERT W. BROWN III, et al.,

Plaintiffs

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

Defendant

OPINION AND ORDER

The Court has before it Plaintiffs' motion for class certification (No. 54), Defendant's opposition thereto (No. 56), and Plaintiff's reply brief (No. 59). Plaintiffs Herbert W. Brown III, Jose L. Ubarri, and David W. Roman filed this action pursuant to 42 U.S.C. § 1983 for violations of their rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution. Plaintiffs alleged that Defendant Colegio de Abogados, an integrated bar association[1] in Puerto

1. An integrated bar association is defined as a bar association in which membership is statutorily required of attorneys in order to practice law in a particular jurisdiction. *See* Black's Law Dictionary 158 (8th ed. 2004).

Rico, used forty percent of each attorney's annual dues to purchase a compulsory life insurance policy. Plaintiffs claim that this use of their dues is unconstitutional because it is not germane to the purposes of an integrated bar association.

Plaintiffs seek certification of two separate classes of attorneys. The first class ("declaratory class") includes all attorneys practicing in the local courts of the Commonwealth of Puerto Rico now and in the future. The second class ("damages class") includes all attorneys practicing in the local courts of the Commonwealth of Puerto Rico between 2002 and 2006 who were required to pay annual dues to Defendant. For the reasons stated herein, Plaintiffs' motion **(No. 54)** is hereby **GRANTED**.

I. STANDARD FOR CLASS CERTIFICATION

Rule 23(a) of the Federal Rules of Civil Procedure states that one or more members of a class may sue or be sued as representative parties on behalf of all class members only if certain following prerequisites are met, including numerosity, commonality, typicality, and adequate representation. Fed. R. Civ. P. 23(a). A plaintiff bears the burden of establishing the necessary Rule 23 requirements. *See Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003) ("to obtain class certification, the plaintiff must establish the four elements of Rule 23(a) and one of several elements of Rule 23(b)"). When evaluating whether class certification is appropriate, courts must engage in a "rigorous analysis of the prerequisites established by Rule 23."

Smilow, 323 F. 3d at 38. Courts must also exercise their "power to test disputed premises early on if and when the class action would be proper on one premise but not another." *Tardiff v. Knox County*, 365 F.3d 1, 4-5 (1st Cir. 2004). In so doing, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). Courts are under an independent obligation to test for "actual, not presumed, conformance with Rule 23(a)." *Gen. Tel. Co.*, 457 U.S. at 160.

If all of the 26(a) requirements are met, the plaintiff must establish that the action is maintainable under one of the three subsections of Rule 23(b). *Smilow*, 323 F.3d at 38. Rule 23(b)(1) covers cases in which individual actions by or against class members might "establish incompatible standards of conduct for the party opposing the class" or would "as a practical matter . . . be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1); *see Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Such cases typically include those in which the opposing party must treat all members alike as a matter of law or where there is a limited fund from which members seek recovery. *Amchem Prod., Inc.*, 521 U.S. at 614.

Rule 23 (b) (2) covers cases in which declaratory or injunctive relief is sought and the opposing party "has acted or refused to act on grounds that apply generally to the class . . . " Fed. R. Civ. P. 23(b)(2). Civil rights cases are a prime example. *Amchem*, 521 U.S. at 614.

Lastly, Rule 23(b)(3) covers cases in which "class-action treatment is not as clearly called for" as in situations governed by subsections (1) and (2), but where a class action is nevertheless "convenient and desirable." *Id.* Such cases typically arise when each individual's recovery is too minimal to compel members to bring individual claims. *Id.* at 617.

II. ANALYSIS

In support of their motion for class certification, plaintiffs argue that the two classes they seek to certify are so numerous that joinder of all members would be impracticable. Defendant opposes Plaintiffs' request for class certification, arguing first that the Court cannot consider the requirements for class certification while a motion challenging jurisdiction is pending. While not argued with specificity in Defendant's opposition, Defendant also disputes that Plaintiffs satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure to be certified as a class. The Court will now consider Defendant's arguments in turn.

A. Defendant's Jurisdictional Challenge

The Court need not labor long over Defendant's first objection to Plaintiffs' motion for class certification because the jurisdictional challenge to which Defendant refers has been resolved, thereby establishing this Court's jurisdiction over Plaintiffs' action. Specifically, the Court denied Defendant's motion to dismiss on June 18, 2008. No. 62. As such, Defendant's opposition to class

certification based on the pending jurisdictional challenge is moot.

Furthermore, the cases cited by Defendant in support of its argument that the Court must resolve the jurisdictional motion before considering Plaintiffs' motion for class certification merely stand for the proposition that a party seeking class certification must independently satisfy the constitutional prerequisites for bringing the action in the first place. This proposition is not in dispute. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class"); *See also Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (explaining that a class representative must independently have standing).

The Court will now consider whether Plaintiffs' proposed classes meet the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

B. Plaintiffs Meet the Requirements of Rule 23(a)

Rule 23(a) of the Federal Rules of Civil Procedure sets forth the following prerequisites for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class,

> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The Court will now analyze whether Plaintiffs' proposed classes meet the aforementioned pre-requisites of Rule 23(a)

1. Numerosity of Plaintiffs' Proposed Classes

Although numbers alone do not determine numerosity, case law suggests that a class numbering in the hundreds typically satisfies the requirement. *See e.g., Adver. Specialty Nat'l Ass'n v. FTC*, 238 F.2d 108, 119 (1st Cir. 1986) (holding that a class of 300 members appears to "fall within the accepted legal test of . . . 'impracticability' . . . "); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 132 (1st Cir. 1985) (indicating that a proposed subclass of forty-nine plaintiffs might satisfy the numerosity requirement if the members did not live in the same geographic area). Furthermore, the party instituting the action need not show the exact number of potential members in order to satisfy the numerosity prerequisite, but also cannot rely on mere speculation. *Collazo v. Calderón*, 212 F.R.D. 437, 442 (D.P.R. 2002).

In this case, the members of Plaintiffs' two proposed classes number in the thousands and practice law throughout Puerto Rico. Joinder of such a large number of Plaintiffs would be impracticable and thus Plaintiffs have satisfied the numerosity requirement of Rule 23(a).

2. Commonality of Plaintiffs' Proposed Classes

The commonality element of Rule 23(a) requires Plaintiffs to show that there is "at least one question of law or fact common to the class." *Collazo*, 212 F.R.D. at 442. When the question of law presented by a proposed class arises out of standardized conduct by the defendant, the commonality element generally is satisfied. *Smilow*, 323 F.3d at 39; *Collazo*, 212 F.R.D. at 442. Here, Defendant's alleged constitutional violation is based on a standard fee to which Plaintiffs and all proposed class members were or would be subject as practicing attorneys in Puerto Rico. Thus, the central questions of law and fact are identical for Plaintiffs and the proposed class members, thereby satisfying the commonality requirement.

3. Typicality of Plaintiffs' Proposed Classes

The typicality requirement is satisfied if the class representative's claims are typical of the claims of the proposed class members. *Rivera v. Amer. Home Prod. Corp.*, 191 F.R.D. 45, 47 (D.P.R. 1999); *Collazo*, 212 F.R.D. at 442. Factual differences between claims will not defeat class certification unless they predominate and require a court to engage in "highly fact-specific or individualized determinations" to assess the defendant's liability to each class member. *Collazo*, 212 F.R.D. at 442-43.

In this case, Plaintiffs are attorneys currently practicing in Puerto Rico who also were practicing

between 2002 and 2006. Plaintiffs' claims are thus identical to those of all declaratory class members, who seek assurance that Defendant will not re-institute the compulsory life insurance program, and all damages class members, who seek recovery for Defendant's violation of their constitutional rights based on Defendant's collection of dues for the compulsory life insurance program between 2002 and 2006. Therefore, Plaintiffs satisfy the typicality requirement.

4. Adequate Representation of Class Interests

The final prerequisite for acquiring class status requires Plaintiffs to show that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23 (a)(4). In analyzing this requirement, the United States Court of Appeals for the First Circuit has devised a two-part test: "the moving party must show first that the interests of the representative party will not conflict with the interests of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews*, 780 F.2d at 130.

Part one of the two-part test requires Plaintiffs to have the same interest and suffer the same injury as the class members. *Amchem Prod., Inc.*, 521 U.S. at 625. In this case, Plaintiffs, like all declaratory class members, are members of Defendant association and have an interest in ensuring that Defendant will not re-institute the compulsory life insurance policy in the

future. Plaintiffs, like damages class members, were members of Defendant association between 2002 and 2006, and suffered the same alleged injury through the compelled payment of dues for the life insurance policy during that time period. Plaintiffs' interests in this litigation are consistent with those of the proposed class members.

Part two of the test is satisfied where Plaintiffs' attorneys combined have over forty years of litigation experience and have not shown indifference or undue delay in pursuing this litigation. *See Andrews*, 780 F.2d at 130 (stating that the class representative and his counsel showed indifference where there was an "inexcusably long delay" in prosecuting the plaintiffs' case). The Court is presented with no reason to believe that Plaintiffs' counsel will not adequately represent their clients. As such, the Court finds that Plaintiffs satisfy the class certification prerequisites of Rule 23(a).

C. Plaintiffs Meet the Requirements of Rule 23(b)

Having determined that Plaintiffs have satisfied the requirements set forth by Rule 23(a), the Court will analyze both the proposed declaratory and damages classes separately to determine whether they satisfy the requirements of Rule 23(b).

1. Proposed Declaratory Class

The proposed declaratory class encompasses "[a]ll attorneys practicing in the Commonwealth of Puerto

Rico local courts now and in the future" and seeks declaratory judgment: (1) stating that the compulsory life insurance policy violates the First Amendment, and (2) enjoining Defendant from compelling any attorney to purchase the policy. No. 54. The Court finds that the declaratory class should be certified under Rule 23(b)(2) because Defendant has "acted or refused to act on grounds that apply generally to the class, so that . . . relief is appropriate respecting the class as a whole . . . ." Fed. R. Civ. P. 23(b)(2).

Though class certification may properly be denied under Rule 23(b)(2) when the declaratory or injunctive relief sought by an individual plaintiff would necessarily benefit the proposed class as a whole, certification may be approved "where other considerations may render a denial of certification improper." *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985). One such consideration is "where the good faith of the loser cannot be fairly presumed." *Id.*

In the case at hand, Defendant continued its policy of requiring its members to purchase the life insurance policy even after such requirement was found to violate the First Amendment with respect to Attorney Carlos Romero. *See Romero v. Colegio de Abogados*, No. 94-2503 (No. 113). Just as the injunction with respect to Attorney Carlos Romero did not prevent Defendant from charging other members the unconstitutional fee for life insurance, granting declaratory relief to Plaintiffs alone may be insufficient to ensure that Defendant does not violate the rights of all proposed declaratory class

members. Therefore, declaratory relief may be appropriate respecting the declaratory class as a whole, and therefore the Court certifies the declaratory class pursuant to Rule 23(b)(2).

2. Proposed Damages Class

The proposed damages class encompasses "[a]ll attorneys practicing in the Commonwealth of Puerto Rico local courts from 2002-2006, who were obligated to pay the [Defendant] Colegio de Abogados their yearly annual membership renewal fee in order to practice law in this jurisdiction." No. 54. The relief sought for the damages class includes damages for breach of First Amendment rights and for temerity.

Plaintiffs' arguments fail under 23(b)(1) because, *inter alia,* although it is possible that lawsuits by individual members of the proposed damages class would lead to differing outcomes in terms of Defendant's liability to each member, this is an insufficient basis to satisfy the "inconsistent or varying adjudications" requirement of Rule 23(b)(1)(A). *See In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987). Plaintiffs' arguments under Rule 23(b)(2) also fail because this section is typically restricted to cases involving declaratory or injunctive relief. *See Tilley v. TJX Cos.*, 345 F.3d 34, 40 (1st Cir. 2003). However, the Court finds that class certification is proper pursuant to Rule 23(b)(3).

Rule 23(b)(3) provides for certification of a class for which "questions of law or fact common to class members

predominate" and for which adjudication as a class action is a superior method for deciding members' individual claims. In determining whether these requirements are satisfied, the court should consider the following non-exclusive factors: (A) class members' interest in individually controlling the litigation; (B) the "extent and nature" of any ongoing litigation governing the controversy by or against class members; (C) the desirability of concentrating the litigation in the particular forum; and (D) manageability of the class action. Fed. R. Civ. P. 23(b)(3).

In this case, the predominance requirement is satisfied because the ability of all members to recover damages from Defendant is based on a single common issue: whether it was a violation of the damages class members' constitutional rights to subject them to the mandatory life insurance policy after the practice had been declared unconstitutional with respect to Attorney Carlos Romero. Though some individualized damages determinations may be necessary if Defendant returned the life insurance dues to some class members, the need for a few individualized determinations does not defeat predominance where Defendant's liability to all members remains subject to common proof. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008), *Smilow*, 323 F.3d at 40; *Tardiff*, 365 F.3d at 6.

Further, a class action is the superior method for resolving members' claims. As the United States Supreme Court has explained, the purpose of the

superiority prong of Rule 23(b)(3) is to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated . . . " *Amchem Prod., Inc.*, 521 U.S. at 615. If Plaintiffs prevailed in the current action, it is likely that other class members would bring suit in this Court alleging identical claims, resulting in repetitive, time-consuming, and wasteful litigation. The likelihood of this scenario finds support in the extent to which the current litigation mirrors that involving Attorney Romero, in which this Court issued a final decision in 2002. *Romero v. Colegio de Abogados*, No. 94-2503 (No. 113). Since the factual differences among the damages class members are so slight and the legal issues are common among all members, justice is best served if all claims are adjudicated consistently through a class action. Lastly, the Court is not aware of any manageability problems that would arise if Plaintiffs' motion with respect to the damages class is granted. The Court finds that the damages class meets the requirements for class certification in Rule 23(b)(3).

III. CONCLUSION

In conclusion, the Court holds that Plaintiffs have satisfied the requirements for class certification for both proposed classes. As such, Plaintiffs' motion for class certification is hereby granted.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 31st day of July, 2008.

/s/_____
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

APPENDIX F — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO DATED APRIL 24, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 06-1645 (JP)

HERBERT W. BROWN III, et al.,

Plaintiffs

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

Defendant

AMENDED FINAL JUDGMENT

For the reasons stated in its Opinion and Order of September 26, 2008, the Court hereby **ENTERS JUDGMENT FOR PLAINTIFFS** to have and recover from Defendant Colegio de Abogados de Puerto Rico the amount of **FOUR MILLION ONE HUNDRED FIFTY SIX THOUSAND NINE HUNDRED EIGHTY EIGHT DOLLARS AND SEVENTY CENTS ($4,156,988.70)**; plus interest, costs, and attorneys' fees.

This Court hereby enters a permanent injunction as follows: Defendant Colegio de Abogados de Puerto Rico is hereby prohibited from collecting from its

members that portion of their future annual dues attributable to the Colegio's mandatory group life insurance program. Failure to comply with this Judgment will result in an immediate reimbursement of the funds allocated for compulsory group life insurance, or an Order of Execution against the property and assets of the Colegio.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 24th day of April, 2009.

/s/
JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED AUGUST 18, 2010

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 08-2432

HERBERT W. BROWN, III; JOSE L. UBARRI; ROMAN W. ROMAN

Plaintiffs - Appellees

v.

COLEGIO DE ABOGADOS DE PUERTO RICO

Defendant - Appellant

Before: Lynch, *Chief Judge*, Boudin, Lipez, Howard and Thompson, *Circuit Judges*.

Entered: August 18, 2010

ORDER OF COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:
/s/_____
Margaret Carter, Clerk